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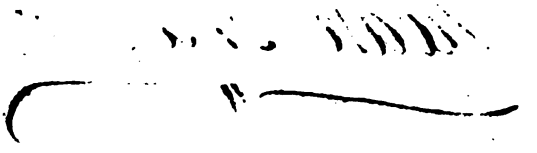

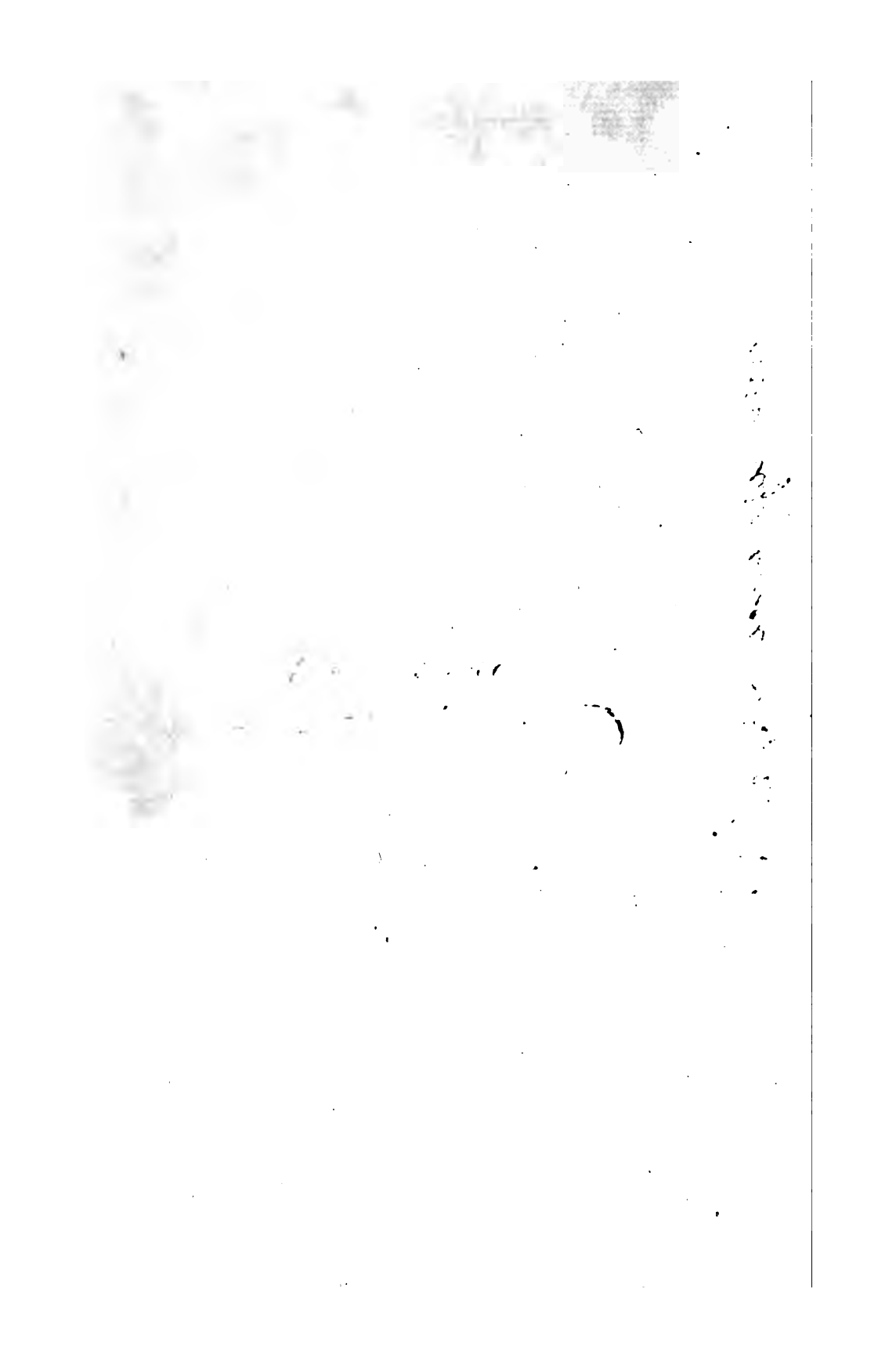

REPORT

OF THE

TRIAL AND ACQUITTAL

OF

EDWARD SHIPPEN, *Esquire*, CHIEF JUSTICE,

AND

JASPER YEATES AND THOMAS SMITH, *Esquires*,

ASSISTANT JUSTICES,

OF THE SUPREME COURT OF PENNSYLVANIA,

ON AN IMPEACHMENT,

BEFORE THE SENATE OF THE COMMONWEALTH,

JANUARY, 1805.

BY WILLIAM HAMILTON,
EDITOR OF THE LANCASTER JOURNAL.

LANCASTER:
PRINTED BY THE REPORTER.

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District of Pennsylvania, to wit:

BE it remembered, that on the 12th day of August, in the thirtieth year of the Independence of the United States of America, A. D. 1805, William Hamilton, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as author, in the words following, to wit:

"Report of the Trial and Acquittal, of Edward Shippen, Esquire, "Chief Justice, and Jasper Yeates and Thomas Smith, Esquires, "Assistant Justices, of the Supreme Court of Pennsylvania, on an "Impeachment, before the Senate of the Commonwealth. Janua-"ry, 1805. By William Hamilton, Editor of the Lancaster Journal."

In conformity to the act of the Congress of the United States, intituled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned;" and also to the act, entitled "An act supplementary to an act, entitled. "An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned," and extending thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL, *Clerk of the District of Pennsylvania.*

NOTE.

The reader will observe in page 327, *that Mr. Boileau refers to the opinion of Mr. Lewis, as contained in a letter from that gentleman to Mr. Passmore. The reporter had not a copy of this letter at the time when Mr. Boileau's speech was put to press. It was afterwards procured, and will be found as read by Mr. Ingersoll in pages* 391, '2, '3.

TRIAL

OF

EDWARD SHIPPEN, Esq. Chief Justice,

AND

JASPER YEATES, & THOMAS SMITH,

Esqr's. Assistant Justices of the Supreme Court of Pennsylvania,

ON AN IMPEACHMENT

BEFORE THE SENATE OF THE COMMONWEALTH:

JANUARY, 1805.

INTRODUCTION.

ON the 28th of February, 1803, in the House of Representatives of the commonwealth of Pennsylvania, Mr. Ferguson presented the following memorial, signed by Thomas Passmore, of the city of Philadelphia.

To the HONORABLE the HOUSE of REPRESENTATIVES of the Commonwealth of Pennsylvania.

The memorial of *Thomas Passmore*, of the city of Philadelphia,

RESPECTFULLY SHEWETH,

That your memorialist conceives it to be the undoubted and most invaluable right of every free citizen of this Commonwealth, to address your honorable body, when he has unfortunately sustained injuries of such a description, as you, and you only, are properly authorized to redress; and that it is more especially the bounden duty of any individual, who seriously apprehends the constitutional and legal exercise of Judicial authority towards himself, to have been manifestly exceeded, to present for your consideration a case, pregnant with so many alarming consequences to the rights and liberties of the people: Under these impressions, your memorialist respectfully solicits your attention to a recent decision of the honorable *Edward Shippen*, Chief Justice, and *Jasper Yeats* and *Thomas Smith*, Esquires, Judges of the Supreme Court of this state, in which, without the opportunity of defending him-

ſelf before a jury of his peers, for a conſtructive and implied contempt, not occurring in the view of the Court, nor relating to any cauſe which could be conſidered as pending therein, he was torn from his family and buſineſs, and ignominiouſly ſentenced to a cloſe confinement for thirty days, and the payment of a fine of fifty dollars, and this too after he had ſubmitted to the inquiſitorial proceeding of anſwering fully to written interrogatories.

The circumſtances of the caſe, were as follows:—— Meſſrs Pettit and Bayard, of the city of Philadelphia, merchants, were, with ſeveral other perſons, underwriters upon a policy of inſurance on a veſſel of your memorialiſt. A loſs happened, and the underwriters were applied to for the amount of their reſpective engagements. The gentlemen juſt named, were the only perſons who at firſt made any difficulty on the ſubject; but, in conſequence of their refuſal, the other underwriters alſo declined payment, and your memorialiſt, to his great injury, was kept out of a large ſum of money juſtly due to him. At length, however, Meſſrs Pettit and Bayard, agreed to enter into an amicable reference under a rule of Court with your memorialiſt, and the other underwriters followed their example; two referees were choſen, and according to the previous agreement of all parties, called to their aſſiſtance a third referee, the mutual allegations of both parties were fully and fairly heard, and an award made in favor of your memorialiſt—the ſaid award was returned into the Prothonotaries office, and agreeably to the terms of the reference, a judgment was entered thereon; notice of the ſame was given to Meſſrs Pettit and Bayard, and the other underwriters, all of whom, except ſaid Pettit and Bayard, acquieſced, and paid to your memorialiſt the ſums for which they were reſpectively bound; the period allowed by the rules and practice of the Court to a diſſatisfied party to file exceptions, elapſed, and an execution was iſſued againſt them; after this, however, Mr. Andrew Bayard filed exceptions to the report of the referees which your memorialiſt was informed by his Counſel, were out of time, and therefore would not be received by the Court; but they had the effect of occaſioning a conſiderable delay in the recovery of the money. Smarting under a ſenſe of the injury done him by this procedure on the part of Mr. Bayard, your memorialiſt in the fervor of momentary reſentment, wrote a paper, expreſſive of his feelings, and put the ſame up at the merchant's coffee houſe, on a board to which advertiſements are generally attached, and which ſituation was pointed out by the keeper of the ſaid coffee houſe, as a proper one for the purpoſe. It was, however,

not ſuffered to remain there one minute, the perſon juſt mentioned taking it down before it was read by any other perſon but himſelf, and afterwards delivering it to Mr. Bayard, and, ſubſequent publicity, if ſuch it obtained, is aſcribable therefore to Mr. Bayard, and not to your memorialiſt. This occurrence took place on the eighth of September laſt. At the following Term, the counſel of Mr. Bayard, applied to the Supreme Court, and obtained a rule on your memorialiſt, to ſhew cauſe why an attachment ſhould not iſſue againſt him for a contempt, and after argument on the eighth of December laſt, an attachment was awarded. On the ſixteenth of the ſame month, your memorialiſt was ordered by ſaid Court to anſwer interrogatories; to which order he, without heſitation, yielded obedience. In thoſe anſwers, your memorialiſt ſtated, that to the beſt of his judgment and belief, at the time of writing the above mentioned paper, there was no ſuit depending between him, and Pettit and Bayard; for, that although ſuch an action had been inſtituted between him and Pettit & Bayard, and referred under an amicable agreement; yet, before the time alluded to, a report had been made in favor of your memorialiſt, and the ſuit determined by a judgment entered thereupon, that altho' exceptions had been afterwards filed, your memorialiſt underſtood and believed it to be a rule of the Supreme Court, that where by the tenour of the ſubmiſſion, the report of the referees is to be made into office; if ſuch report is made, notice thereof given to the party againſt whom it operates, and no exceptions filed within four days thereafter, the ſame becomes abſolete & unavoidble; that ſuch was the impreſſion on the mind of your memorialiſt, at the time of the commiſſion of the alledged contempts; and that he was the more confirmed therein by the acquieſcence of the other underwriters; he alſo mentioned as has been herein before ſtated, that the paper, containing the offenſive expreſſions, was immediately after being put up, torn down by the keeper of the coffee-houſe before it had been read: In the doing of which, he declared he had not the moſt diſtant intention to prejudice the public mind in his favor, or to treat with diſreſpect the Judicial authority of his country, for which he had always entertained the utmoſt reſpect; and that his conduct was merely the reſult of the heat and paſſion of the moment, notwithſtanding which, declarations on his part, thus unreluctantly and reſpectfully made, under the ſolemnities of an oath, the ſevere and diſgraceful puniſhment was inflicted upon, and ſuffered by your memorialiſt; that in the courſe of the diſcuſſion, the counſel of your memorialiſt was interrupted, and ſo far diſcouraged by the Court, as to leave the diſcuſſion of the queſtion on his part unfiniſhed. Your memorialiſt himſelf was refuſed to be heard, and in-

ſtead of conſidering the offence as committed againſt the Juſtice of the country, he was repeatedly told by the Court, that a perſonal apology to Mr. Bayard, would mitigate, if not prevent, the intended puniſhment; thus clearly evincing that the Court conſidered the injury of a *personal* nature, not affecting the fair adminiſtration of public juſtice, while at the ſame time they refuſed to leave the perſon conſidering himſelf injured to his action at law, as your memorialiſt humbly apprehends of right they ought to have done. Your memorialiſt ſubmits to your Honorable Body, that in this tranſaction, the above named Judges have violated the duties, and exceeded the powers of the high ſtation delegated to them; that even in the annals of Britiſh juriſprudence, no caſe can be found where ſuch an act has been conſidered a contempt; that the paper referred to, did not relate to a ſuit depending for trial, ſo as improperly to bias the minds of the public, nor did it in the moſt diſtant manner, reflect upon the Court or any of its officers, that in its moſt aggravated colours, it could have been no more than a perſonal affront to Mr. Bayard; and, even that was prevented, by the interference of a third perſon; that ſhould an unprecedented rigor of conſtruction be allowed to exact the circumſtance into a conſtructive or implied contempt of the Court, even the ſtricteſt principles of common law would have abſolved your memorialiſt, when he had purged ſuch contempt by full and ſatisfactory anſwers to written interrogatories: And finally, he ſubmits it to your better judgment, whether the proceedings againſt him do not involve a manifeſt infraction of the bill of rights, and whether theſe ſummary judicial proceedings for conſtructive offences, if unnoticed by the Legiſlature, may not pave the way for the deſtruction of the ineſtimable right of trial by jury.

Your memorialiſt therefore prays, that you would be pleaſed to take the above circumſtances into conſideration, and enquire whether the above named JUDGES have not made themſelves the objects of IMPEACHMENT.

(Signed) THOMAS PASSMORE.

Philadelphia, February 26, 1803.

The memorial was read, and referred to Meſſrs. H. Ferguſon, F. Smith, D. Montgomery, D. Mitchel, J. M'Malters, J. Roſs, and Iſaiah Davis, to conſider and report thereon. This committee, on the 9th of March, 1803, made the following report:—

That they have examined the petition and documents accompanying it, and heard the allegations of the com-

plainant, and are of opinion, that the ſummary mode of puniſhing contempts, by attachment as laid down in the Engliſh books, and practiſed by our Courts, is not agreeable to the genius of the conſtitution and laws of the commonwealth of Pennſylvania, although ſuch power may be a neceſſary attendant upon every ſuperior tribunal in caſes of direct contempts, which openly inſult or reſiſt the authority of the Court, or the perſons of the judges who preſide there while in the actual diſcharge of their official duty.

The committee are of opinion there is no neceſſity of ſuch a power in the courts of juſtice, where the contempts are only conſequential or conſtructive, and not committed in the hearing of the Court, nor by treating with diſreſpect the rules or proceſs thereof; every deciſion of facts, by courts of law, without the intervention of a jury, is a ſtep towards eſtabliſhing ariſtocracy, the moſt oppreſſive of abſolute governments, and if not timely guarded againſt, may imperceptibly undermine the trial by jury, the beſt preſervative of liberty: The committee therefore offer the following reſolution, viz.

Reſolved, That a committee be appointed to prepare and report a bill, to define the powers of the courts of juſtice to puniſh contempts in a ſummary mode.

The foregoing was made the order of the day, for Monday, the 14th of March, but it was not called up on that day. On the 15th, the report and memorial were read a ſecond time, and on motion of Mr. D. Mitchel and Mr. A. Leacock, committed to a *ſpecial committee*, conſiſting of Meſſrs. C. Porter, J. Engle, J. Simpſon, R. Welles, and W. Steele, who, on the 18th, made the following report:—

That the committee have attended to the memorial, and examined the documents adduced in evidence to ſubſtantiate the charges, and from the view they have taken of the ſubject, they are of opinion, that ſufficient cauſe exiſts to inſtitute an enquiry, but in conſequence of the late period of the ſeſſion, it would be inexpedient to enter into an inveſtigation at this time; That in the opinion of the committee, a law ought to paſs, declaring what ſhall conſtitute a contempt of court, that neither paſſions nor prejudices may operate to the injury of individuals; that a contempt being defined, the citizens will not be expoſed to the commiſſion of an unknown crime; that to ſecure their liberty and protect their property, is the duty and prero-

gative of the Legiſlature: Under ſuch impreſſions, the committee offer the following reſolutions, viz.

1. *Resolved*, That a committee be appointed to draft and report a bill, defining what ſhall conſtitute a contempt of court.

2. *Resolved*, That it be eſpecially recommended to the ſucceeding Houſe of Repreſentatives, to enquire into the conduct of the judges of the Supreme Court, relative to their proceedings againſt Thomas Paſſmore.

Ordered to be laid on the table.

In the enſuing ſeſſion of the Legiſlature, on the 17th of January, 1804, Mr. John Boyd, from the committee appointed to examine the Journals and files of the late Houſe, and report the unfiniſhed buſineſs, reported the "*Resolution* founded on the memorial of Thomas Paſſmore, of Philadelphia, complaining of the conduct of Edward Shippen, Jaſper Yeates, and Thomas Smith, Judges of the Supreme Court."

This report was referred to the *committee of grievances*.

On the 13th of March following, Mr. J. Goodman, from the committee of grievances, reported as follows:—

That after having examined the witneſſes produced to them, and carefully taken down the teſtimony, and given the ſubject a due conſideration, the following facts appear to be ſubſtantiated, viz.

That an amicable ſuit was entered into between Thomas Paſſmore, plaintiff, and Pettit and Bayard, defendants, on the 13th day of July, 1802, on a conteſted policy of inſurance, both parties having choſen their man, as referees, with power in caſe of diſagreement to chooſe an umpire, who, not agreeing, choſe William Haſlet, umpire, who, with one of the referees, on the ſixth day of Auguſt, 1802, reported an award in favour of Thomas Paſſmore, plaintiff, of four hundred and ninety dollars, with intereſt, which award was returned into the office of the Prothonotary of the Supreme Court, on the ſixth day of Auguſt, 1802, on which judgment was entered on the ſixth day of the ſame month, againſt Pettit and Bayard, defendants; and, that on the eighteenth of the ſame month, execution was iſſued, and a levy made by the ſheriff on the goods of Andrew Bayard, on the ſame day; all which will appear by certified records, herewith reported.

That on the fourth day of September following, exceptions were filed by Andrew Bayard, againſt the deciſion of the referees; that on the eighth day of the ſame month, a paper was poſted up in the coffee houſe, in Philadelphia, by the ſaid Thomas Paſſmore, ſaid to be a libel againſt Pettit and Bayard, in the words following: 'The ſubſcriber publicly declares, that Pettit and Bayard, of this city, merchants and quibling underwriters, has baſely kept from the ſubſcriber, for nine months, about five hundred dollars, and that Andrew Bayard, the partner of Andrew Pettit, did on the third or fourth inſtant, go before John Inſkeep, Eſq. alderman, and ſwore to that which was not true, by which the ſaid Pettit and Bayard, is enabled to keep the ſubſcriber out of his money for about three months longer, and the ſaid Bayard, has meanly attempted to prevent others from paying the ſubſcriber about two thouſand five hundred dollars, but in this mean dirty action he was diſappointed in, I therefore do publicly declare Andrew Bayard, a lier, a raſchal, and a coward; and do offer two and a half per cent to any good perſon or perſons, to inſure the ſolvency of Pettit and Bayard, for four months from this date.'

THOMAS PASSMORE.

Philadelphia, Sept. 8th, 1802.

For which libel, the ſaid Thomas Paſſmore, was committed to the cuſtody of the ſheriff of Philadelphia county, in the debtors apartment of the common goal, for the ſpace of thirty days, and was fined fifty dollars, to the commonwealth, for an alledged contempt of Court. It appears, moreover, from the evidence, that the uſual courſe of proceeding was, in the firſt inſtance, departed from by the Court. Immediate ſentence, or atonement to Mr. Bayard, was the only alternative; but on the ſuggeſtion of Mr. Paſſmore's counſel, interrogatories in the uſual manner, were filed by the counſel of Pettit and Bayard; which interogatories, together with the anſwers thereto, (which anſwers in the opinion of your committee were ſatisfactory, and did purge the contempt, if a contempt had been committed) are herewith reported.

Although the ſaid Thomas Paſſmore, had complied with every requeſt of the ſaid Court, except that he refuſed to make an apology to Andrew Bayard; he was, on the twenty-eighth day of December, 1802, fined and impriſoned by the ſaid Court, as aforeſaid.

Your committee, after a muture conſideration of the ſubject, conceive themſelves juſtified in the opinion, that

the judges have exerciſed a ſtretch of power in this caſe, not warranted by the conſtitution and laws of our country; and that if ſuch an abuſe of power be tolerated, and quietly acquieſced in by the Legiſlature, there is reaſon to fear that the ſafety and perſonal liberty of the citizen, will be annihilated.

That, however willing the committee may be to concede, that every Court of Juſtice neceſſarily poſſeſs the power of puniſhing contempts committed in their preſence and whilſt in ſeſſion; yet they are of opinion, that offences, ſuch as charged againſt the ſaid Thomas Paſſmore, if viewed under all the variety of circumſtances, connected with the caſe, do not amount to a contempt of Court, and conſequently do not warrant the unuſual ſeverity of proceeding, which was had againſt him.

1. Becauſe the publication did not reflect on the judges in their judicial capacity, nor perſonal character.

2. Becauſe there was no direct alluſion in the paper called a libel, to any cauſe pending before the Court.

3. Becauſe it appears from the record, that the ſaid Thomas Paſſmore was warranted in the concluſion, that the ſuit between him and Pettit and Bayard, was then ended, judgment having been entered, and execution iſſued. This opinion is confirmed, becauſe the judgment was not ſet aſide, until after the term of his impriſonment had expired, and after his application to the Legiſlature, for the impeachment of the judges.

4. Becauſe it appears from the evidence, that the Court were ſatisfied with the anſwers of Thomas Paſſmore, to the interrogatories, ſo far as reſpected the alleged contempt againſt themſelves.

5. Becauſe it appears that the puniſhment was inflicted, not becauſe he had committed a contempt of Court, but becauſe he would not apologize, or make atonement to Mr. Andrew Bayard, as the Court had expected.

Upon the whole, your committee cannot but reiterate their opinion, that the proceeding of the Judges in this caſe, is unprecedented in the annals of juriſprudence, and that nothing ſimilar to it is to be found in any other country, where law, and not the arbitrary will of the magiſtrate, is the governing principle; therefore, in order to afford the ſaid Thomas Paſſmore, the remedy pointed out

by the conſtitution, for the injury complained of; and alſo, to put thoſe high and dignified officers to their trial, and afford them an opportunity of juſtifying their conduct to the world, if in their power ſo to do, offer for the adoption of the houſe, the following reſolution, viz.

Resolved, That a committee be appointed to draught articles of impeachment againſt the ſaid Edward Shippen, Eſq. Chief Juſtice of the Supreme Court of Pennſylvania, and Jaſper Yeates, and Thomas Smith, Eſquires, Judges of the ſaid Court, for a high miſdemeanor in their official capacity, by arbitrarily and unconſtitutionally fining and impriſoning Thomas Paſſmore.

Monday, the 19th inſt. was aſſigned for the ſecond reading of this report of the committee of grievances, and it was made the order for that day.

On the morning of the 19th, agreeably to the order of the day, the Houſe proceeded to conſider the report, and after ſome debate, adjourned until three o'clock in the afternoon, when the conſideration was reſumed.

A motion was made by Mr. Porter and Mr. Franklin, to poſtpone the ſame, for the purpoſe of introducing the following as a ſubſtitute to the report of the committee of grievances—

"*Reſolved*, That the charges exhibited by Thomas Paſſmore, againſt the Juſtices of the Supreme Court, and the teſtimony adduced in ſupport of ſaid charges, do not afford ſufficient ground for this Houſe to proceed by impeachment."

On the morning of the 20th, the ſubſtitute was by leave withdrawn. The Houſe again reſumed the conſideration of the report of the committee of grievances, and after conſiderable debate, adjourned until three o'clock P. M. when after ſome further debate, the queſtion was put—"*Will the House agree to the reſolution?*"——[That is, the reſolution of the report of the committee of grievances.]

The Yeas and Nays were called for by Mr. Franklin and Mr. Trevor, and were as follow :—

YEAS.—Meſſrs. Adams, Adcock, Agnew, Alſhouſe, Alter, Acker, Boileau, Boyd, Briſben, Bucher, Clark, Darlington, M. Davis, T. Davis, Dechart, Engle, Fenton, Ferree, Fulton, Giffen, Goodman, Groſs, Harriſon, Hol-

gate, Jenkins, Keehmle, Kerr, Lytle, M'Bride, M'Comb, M'Farlane, Maclay, Mann, Marſhall, Odenheimer, Ogle, Patterſon, Pearſon, Peebles, Pugh, Rhoads, Robinſon, Roſe, Rupert, Scheetz, Schneider, J. Smith, S. Smith, Spangler, Stauffer, Trevor, Turbett, Vance, Weirich, Wilſon, Witman, and Snyder, *ſpeaker*.——57.

NAYS.—Meſſrs. Barclay, Bull, Carver, Coolbaugh, Cunningham, H. Davis, Findlay, Franklin, Hall, Johnſton, Kimmel, Lattimore, Miller, Mytinger, Milnor, Pennell, Porter, Reiley, Roberts, Shriver, Sloan, B. H. Smith, R. Smith, and White.——24.

So it was determined in the affirmative, and Meſſrs. W. Maclay, Boilean, Engle, Kerr, Trevor, M. Davis, and Holgate, were appointed a committee to draft *articles* of impeachment.

In the afternoon of the 22d of March, 1804, Mr. Maclay, from the committee appointed an the 20th inſtant, to draft *articles* of impeachment, made report as follows:—

Article of accuſation and impeachment againſt Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court, of the Commonwealth of Pennſylvania, preferred by the Houſe of Repreſentatives of the ſaid Commonwealth, in their name, and in the name of the people of Pennſylvania; and exhibited to the Senate of the ſaid Commonwealth.

Article I. That the ſaid Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court of this Commonwealth of Pennſylvania, duly commiſſioned and appointed, and acting in their official capacities, on the 18th day of September, A. D. 1802, granted a rule againſt Thomas Paſſmore, of the city of Philadelphia, on the affidavits of Andrew Bayard and James Kitchen, to ſhew cauſe on the firſt day of the then next term, why an attachment ſhould not iſſue againſt him, the ſaid Thomas Paſſmore, for a contempt, in conſequence of the following publication, viz. 'The ſubſcriber publicly declares, that Pettit and Bayard, of this city, merchants, and quibling underwriters, has baſely kept from the ſubſcriber, for nine months, about five hundred dollars; and that Andrew Bayard, the partner of Andrew Pettit, did on the third or fourth inſtant, go before John Inſkeep, Eſq. alderman, and ſwore to that which was not true, by which the ſaid

Pettit and Bayard is enabled to keep the ſubſcriber out of his money for about three months longer; and the ſaid Bayard has meanly attempted to prevent others from paying the ſubſcriber, about two thouſand five hundred dollars; but, in this mean dirty action he was diſappointed in. I therefore do publicly declare, Andrew Bayard a lier, a raſcal, and a coward; and I do offer two and an half per cent. to any good perſon or perſons, to inſure the ſolvency of Pettit and Bayard, for four months from this date.

THOMAS PASSMORE.

Philadelphia, Sept. 6th, 1804.

That on the 8th of December, 1802, an attachment was awarded againſt the ſaid Thomas Paſſmore, and he was bound with ſureties, to appear from day to day, during the continuation of the Court, to anſwer ſuch interrogatories as ſhould be exhibited to him, and to abide the ſentence of the Court.

That interrogatories were accordingly exhibited to the ſaid Thomas Paſſmore, which are as follow—together with the anſwers filed by the ſaid Thomas Paſſmore to the ſame, viz.

In the Supreme Court of Pennſylvania,

The Commonwealth of Pennſylvania, Verſus *Thomas Paſſmore.* } *On attachment for contempt.*

Interrogatories exhibited to Thomas Paſſmore, the above named defendant.

1. Interrogatory—Was there an action depending in the Supreme Court of Pennſylvania, on the 8th day of September, 1802, wherein you were plaintiff, and Andrew Pettit, and Andrew Bayard, merchants and co-partners, trading under the firm of Pettit and Bayard, were defendants. If aye, when was ſuch action inſtituted, and is the ſame ſtill depending in the ſaid Court.

2. Interrogatory—If ſuch action was brought, and is ſtill depending in the ſaid Court, ſtate whether the ſame was referred by conſent of parties; whether the referees made report, and when; whether exceptions were filed to the report, by whom, and when; whether an affidavit was made by the ſaid Andrew Bayard, in ſupport of the

ſaid exceptions ; when, and before whom the ſaid affidavit was made ; and whether the ſaid exceptions and affidavit were filed in the ſaid Court, on or before the 8th day of September, 1802.

3 Interogatory—Peruſe the paper filed in this court, purporting to be ſigned by you, dated Philadelphia, 8th September, 1802, whereupon the motion was made in this Court, for a rule to ſhew cauſe why an attachment ſhould not iſſue againſt you for a contempt of the ſaid court, and declare whether the ſaid paper is written and ſubſcribed by you, and when the ſame was written and ſubſcribed ; and whether the ſaid paper ſo written and ſubſcribed was by you or by any other perſon, and who by your requeſt and direction placed and affixed to a board in the exchange-room, in the city tavern, in the city of Philadelphia, and attached to the ſaid board in the ſaid room, by wafers in the manner advertiſements are there uſually poſted up and fixed.

4. Interrogatory—If the ſaid paper was ſubſcribed and written by you, and by you or by ſome perſon by your requeſt and direction placed and affixed as above mentioned, ſtate whether the declaration in the ſaid paper contained, viz : 'That Andrew Bayard, the partner of Andrew Pettit, did, on the third or fourth inſtant, go before John Inſkeep, Eſq. alderman, and ſwore to that which was not true,' refers to the ſaid affidavit taken and filed in this Court, by the ſaid Andrew Bayard, as aforeſaid, in ſupport of the ſaid exceptions filed to the ſaid report, of the referees in the ſaid action depending in this Court as aforeſaid, between you as plaintiff, and the ſaid Pettit and Bayard, as defendants.

(Copy) A. J. DALLAS.

The Commonwealth of Pennſylvania, Verſus *Thomas Paſſmore.* } *Supreme Court of Pennſylvania, Sur attachment for contempt.*

The anſwers of Thomas Paſſmore, the examinent, to the ſeveral interrogatories filed on the part of the proſecutor in this caſe.

1. Interrogatory—To the firſt interrogatory, the ſaid examinent anſwers, That to the beſt of his judgment and belief, there was no action depending in the Supreme

Court of Pennſylvania, on the 8th day of September laſt, wherein he was plaintiff, and Andrew Pettit, and Andrew Bayard, merchants and co-partners, trading under the firm of Pettit and Bayard, were defendant. That ſuch an action had been inſtituted on or about the 13th day of July laſt, referred under an amicable agreement between the ſaid parties; a report made in favor of the plaintiff and the ſuit determined by a judgment entered thereupon, on or about the 6th day of Auguſt laſt.

2. Interrogatory—In anſwer to the ſecond interrogatory, the examinent ſaith, That he apprehends this queſtion is beſt anſwered by a recurrence to the records of the Court, which muſt certainly afford the ſureſt evidence of the facts to which the interrogatory relates. But the examinent has no objection to declaring that the ſaid ſuit inſtituted by him, againſt the ſaid Andrew Pettit and Andrew Bayard, was referred by conſent of parties; that the referees made report thereon in favor of the ſaid Thomas Paſſmore, on or about the 6th day of Auguſt laſt; that the exceptions to the ſaid report were filed on the part of Meſſrs. Pettit and Bayard, on or about the fourth day of September laſt, together with an affidavit made by the ſaid Andrew Bayard, as this examinant has heard and believes, in ſupport of the ſame exceptions, before John Inſkeep, Eſquire, one of the aldermen of the city; and this defendant further ſaith, That the action was inſtituted by him, againſt the ſaid Andrew Pettit and Andrew Bayard, in order to recover from them the loſs ſuſtained by him on a policy ſubſcribed by them, for five hundred dollars, in the office of Shoemaker and Berrett, of this city, on or about the thirteenth day of September, in the year one thouſand eight hundred and one, on the brig Minerva, belonging to this examinant; and to the beſt of his recollection, he took out of the office of the prothonotary of this Court, on the very day on which the ſaid award was rendered, two copies thereof, and left at the inſurance office of the ſaid Shoemaker and Berrett, on the next day, one copy of ſaid report, with directions to them to communicate the ſame to Meſſrs. Pettit and Bayard, and the other underwriters in the ſaid policy; and the examinent has been informed and believes, that the ſaid award was made known by them to the ſaid Andrew Pettit and Andrew Bayard, or the ſaid Andrew Bayard, on or about the ſeventh day of Auguſt laſt; and the examinent declares, That on the ninth or tenth of the ſaid month, the ſaid Andrew Bayard told this examinent he had ſeen it. That the examinent has always underſtood and believed, and at the preſent day doth believe it to be a rule of this Court,

that if exceptions are not filed to an award, under ſuch circumſtances, viz: When the report is by the tenor of the ſubmiſſion to be made into the office within four days, after the ſame is made known to the party againſt whom it is to operate, ſuch award is thereby rendered abſolute and unavoidable. This was the impreſſion on the mind of the examinent, from about the middle of Auguſt laſt, to the day when he firſt learned that the exceptions in ſaid cauſe were filed, and it immediately afterwards occurred to him, that they were out of time and void, and therefore that the judgment in this examinant's favor muſt remain abſolute; and this examinant was more confirmed in the belief of the validity of this report, becauſe James Lyſle, an underwriter on the ſame riſk, for one thouſand dollars, gave an order in the examinant's favor for the amount on the next day after the ſaid award was rendered. Meſſrs. Philips, Crammond, and Co. underwriters, alſo on the ſame riſk, for one thouſand dollars, gave an order for the amount in this examinant's favor, within about four days after; and Meſſrs. Nicklin and Griffith, underwriters on the ſame riſk, for five hundred dollars, gave a ſimilar order at about the ſame time. That the examinant ſoon after was allowed without oppoſition, to prove his loſs on the ſaid policy, againſt the eſtate of James Yard, a bankrupt, who alſo was an underwriter of one thouſand dollars, on the ſaid policy; ſo that of the four ſolvent defendants, parties to the ſaid award, Meſſrs Pettit and Bayard, were the only underwriters who had not ſettled with the defendant on ſaid policy, in a very few days after the ſaid award given.

3. Interrogatory—In anſwer to the third interrogatory, this examinant ſaith, That the paper alluded to in this interrogatory was ſubſcribed by him, on the day of its date, and by the examinant, placed or fixed up to a board in one of the rooms of the city tavern, but was pulled down within a minute after, before any perſon could read it.

4. Interrogatory—In anſwer to the fourth interrogatory, this examinant ſaith, That the firſt exception filed to the ſaid award, ſtates that the referees therein named had a meeting on the ſubject of the reference with the plaintiff, when the defendants, the ſaid Pettit and Bayard, were not preſent nor notified. In oppoſition to which, the examinant ſtates: That there was no meeting of the ſaid referees to which either of the parties to that ſuit were admitted, of which a notification was not given either by information to the ſaid Andrew Bayard, himſelf or by the referees when they made their adjournment. That this examinant was conſcious of this when he ſigned the ſaid

paper, and did for that reaſon aſſert, that what was ſo ſtated in the affidavit taken before John Inſkeep, Eſq. in ſupport of ſaid exceptions was not true, but in doing this he had not the moſt diſtant intention to prejudice the public mind in his favor, or to treat with diſreſpect the judicial authority of his country, for which he has always entertained the utmoſt reſpect, that this defendant having recently ſettled with every other of the underwriters, in ſaid policy, and having every reaſon to believe, that the award would not be diſputed by any other perſon than the ſaid Andrew Bayard, was ſurpriſed to find that ſuch exceptions had been filed on the part of Pettit and Bayard, as he had peruſed. Wearied by the delays and trouble which he had undergone in the purſuit of his juſt claim; hearing that the ſaid Andrew Bayard, had expreſſed himſelf in terms derogatory to the character of the examinant, and reflecting on the referees; having good reaſon to believe that he uſed every exertion in his power, to prevent the other underwriters on the policy, from ſettling with the examinant, he felt much irritated when he firſt ſaw the exceptions; and in the moment of his heat and paſſion, publiſhed the impreſſions he experienced, without allowing himſelf time to reflect on the harſhneſs of the manner in which they were conceived, or the extent of their application. With reſpect to Mr. Andrew Pettit, one of the ſaid firm of Pettit and Bayard, the examinant has always entertained a reſpectful opinion of him, and is ſorry that expreſſions eſcaped him, which from their generality may tend to implicate a gentleman who has never been ſeen to take any active ſtep, in the meaſures of which he complains, and although he thought at that time, and ſtill thinks, that he was extremely ill uſed, by Mr. Bayard, he certainly would not have adopted the meaſure of publiſhing, if the impetuoſity of the moment had not hurried him into it.

THOMAS PASSMORE.

Sworn 27th December, 1802, before

EDWARD BURD, *Prothonotary*.

In which anſwers the examinant depoſeth to the beſt of his judgment and belief, that there was no action depending in the Supreme Court of Pennſylvania, wherein he was plaintiff, and Andrew Pettit and Andrew Bayard, were defendants at the time, the ſuppoſed contempt was committed. And in his fourth anſwer, diſclaims in the moſt explicit terms, the moſt diſtant intention either to prejudice the public mind in his favor, or treat with diſreſpect the judicial authority of his country, which anſwers ought in legal conſtruction to have purged the contempt,

That though it does not belong to them to ſay, with what degree of legal knowledge they have diſcharged the high duties attached to their official ſtations,—they confidently aſſert, that in no inſtance whatſoever, has their conduct been tainted with corruption, or marked with partiality: They feel that they have invariably adminiſtered the Juſtice of the country with the pureſt views.—

Your memorialiſts, from a thorough ſenſe of the reſpect due to your honorable body, and their own characters, as repreſenting in ſome degree one branch of the government, have patiently and ſilently endured the public charges made againſt them, and the ſeveral improper publications relative thereto, tending to affect and prejudice the public mind: They apprehend it now becomes their bounden duty, to meet thoſe charges with firmneſs. A ſpeedy trial they conſider as a mere act of juſtice to themſelves; but they view the matter in a more extended light as involving the great intereſts of the community. The adminiſtration of the law ſhould not be permitted to reſt in ſuſpected hands: Their energy is impaired thereby, and the guilt or innocence of the party charged ſhould be eſtabliſhed as early as poſſibly a fair trial can be obtained.

Your memorialiſts therefore beg leave to ſolicit a prompt and ſpeedy trial, agreeably to the ſpirit of the laws and conſtitution of this Commonwealth, that equal and impartial juſtice may be done as well to the citizens thereof, as to themſelves.

And your memorialiſts will pray, &c.

EDWARD SHIPPEN,
JASPER YEATES,
THOMAS SMITH,

On the 23d, the article of impeachment was agreed to, and Meſſrs. Maclay, Boileau, Engle, Mitchell, and Bucher, appointed to exhibit ſaid article to the Senate, and on behalf of the Houſe of Repreſentatives to manage the trial. On Saturday, the 24th, the managers exhibited the article to the Senate, and Meſſrs. Pearſon, Rodman, Reed, Porter and Hartzel, of that body, were appointed to aſcertain and fix a proper time for the trial. On the 26th, the committee reported, "That having maturely conſidered the ſubject referred to them, offer the following reſolution," viz:—

"*Reſolved*, That the ſecond Tueſday of December next, will be the moſt convenient time for the Senate to commence the ſaid trial."

The Senate went into committee of the whole on this reſolution, and after ſome time ſpent therein, the committee roſe and reported the reſolution, without amendment.

On this day, (March 26) the following memorial from the Judges to the Houſe of Repreſentatives was preſented by Mr. R. Smith.

To the honorable the Repreſentatives of the Freemen of the Commonwealth of Pennſylvania, in General Aſſembly met:

The memorial of the ſubſcribers, Juſtices of the Supreme Court of the Commonwealth of Pennſylvania,

RESPECTFULLY SHEWETH,

That your memorialiſts, immediately on being informed of your honorable Houſe having adopted a report of the committee on the complaint of Thomas Paſſmore, addreſſed to you a memorial, ſoliciting a prompt and ſpeedy trial of the adopted charge, that equal and impartial juſtice might be done, as well to the citizens of the Commonwealth, as themſelves.

They now beg leave to repreſent, that they are pained by the reflection, that they are not yet furniſhed with the opportunity of defending themſelves: They find themſelves ſubjected to obloquy by the artful repreſentations of *an offender against the laws*, founded on mutilated and imperfect records, and groundleſs inſinuations, and earneſtly deſire to have it in their power to remove that cloud with which they have been induſtriouſly enveloped.

They further ſuggeſt a conſideration which cannot have eſcaped the wiſdom of your body, that in a government of laws, reſting in a great meaſure on public opinion, whatever has a tendency to throw a public odium on the magiſtracy, neceſſarily leads to relaxation of the obedience due from every individual to the laws of the country, and is attended with the moſt injurious conſequences to the community; It therefore becomes indiſpenſible, that the impreſſions thus created, ſhould either be removed, or eſtabliſhed in the moſt ſpeedy manner.

Your memorialiſts conceive themſelves entitled to a ſpeedy, public, and impartial trial: They feel a conſciouſneſs, that they have never intentionally deviated from the words or ſpirit or that *conſtitution*, which they have ſolemnly ſworn to ſupport: They diſclaim all exerciſe of power, according to arbitrary will: The known laws of the land have been their uniform line of conduct: Their ſenſe of reputation, both individual and official, they ſubmit to the feelings of the honorable members of your Houſe, who will duly appreciate the ſame.

They will readily agree to any fair meaſure which may accelerate the trial of their propoſed impeachment. They hold

themſelves in readineſs to appear before the honorable Senate in a moments warning.

Your memorialiſts therefore take the liberty of reiterating their anxious ſolicitations for a prompt and ſpeedy trial; and that your honorable Houſe will purſue ſuch meaſures, as your wiſdom and juſtice ſhall point out, in order to effectuate this deſirable purpoſe.

And your memorialiſts will pray, &c.

EDWARD SHIPPEN,
JASPER YEATES,
THOMAS SMITH.

And, on the following day, (March 27th) Mr. Brady preſented another memorial from the Judges, to the Senate, and on motion of Mr. Brady, ſeconded by Mr. Barton, it was entered at large on the Journals, as follows :—

To the honorable the Senate of the Commonwealth of Pennſylvania,

RESPECTFULLY SHEWETH,

That your memorialiſts have underſtood, that the honorable Houſe of Repreſentatives have preferred articles of impeachment againſt them, for a high miſdemeanor in office, by arbitrarily, and unconſtitutionally, fining and impriſoning Thomas Paſſmore.

They verily believed, that every thing they have done in the premiſes, in their judicial capacity, is warranted by the laws and conſtitution of the ſtate; and their conſciences acquit them of every ſpecies of corruption and partiality whatever.

They have urged a ſpeedy trial, by two memorials to the Houſe of Repreſentatives; they are prepared to anſwer for their conduct; they demand, as a matter of conſtitutional and common right, a ſpeedy public trial by an impartial Court, to confront their adverſary, and meet the witneſſes face to face.

They cannot diſſemble their ſatisfaction, that they are entitled to a hearing in a Court of juſtice, where their conduct will be judged of by the evidence alone; where paſſion, prepoſſeſſion, and prejudice, cannot enter, and where a due diſcharge of the official duties of the members is ſecured to them by the ſanction of religion, a ſolemn appeal to Heaven.

Your memorialiſts beg leave to repreſent, that their labors of the laſt term are juſt terminated, and they will ſoon be called to the performance of other duties in the Circuit Courts.

They implore you, as men of honor and virtue, to take into your ſerious conſideration, whether thus charged with a breach of the conſtitution they have ſworn to ſupport, and with arbitrary conduct, unſupported by law, they can with propriety, go into the different counties, to adminiſter the juſtice of the country; and whether ſuch a ſtep, while the charge againſt them remains untried, would not reflect diſgrace on their individual and official characters, in the eyes of every virtuous citizen, and do irreparable injury to the obedience juſtly due to the laws.

They therefore requeſt your honorable Houſe to appoint an early day for the trial of their impeachment, which they are anxiouſly prepared to anſwer, and to grant them compulſory proceſs for obtaining witneſſes in their favor.

And your memorialiſts will pray, &c.

EDWARD SHIPPEN,
(Signed) *JASPER YEATES,*
THOMAS SMITH.

In ſenate, the ſame day, (March 27) the report of the committee, fixing the time for trying the impeachment preferred againſt the Judges of the Supreme Court, was read the ſecond time—whereupon, on motion of Mr. Heſton, ſeconded by Mr. Barton, it was agreed that the ſaid report be recommitted to the committee of the whole. The memorial of the Judges preſented this day, was alſo read a ſecond time, and committed to the committee of the whole.

Thereupon the Senate reſolved itſelf into a committee of the whole, and after ſome debate, reported the following amendment:—

"*Reſolved*, That the *firſt Monday in January* next, will be the moſt convenient time for the Senate to commence the ſaid trial."

On motion of Mr. Barton, ſeconded by Mr. Lane, and by ſpecial order the report of the committee of the whole was read a ſecond time—whereupon, it was moved by Mr. Barton, ſeconded by Mr. Lane, that the words—"*the firſt Monday in January*" be ſtricken out, and "*Thurſday, the fifth of April,*" (1804) be inſerted in place thereof. The Yeas and Nays, on

agreeing to the amendment, were required by Mr. Barton and Mr. Pearſon, and were as follows :—

YEAS.—Meſſrs. Barton, Brady, Follmer, Harris, Lane, Pearſon.——6.

NAYS.—Meſſrs. Gamble, Hartzel, Heſton, Lower, Lyle, M'Arthur, Mewhorter, Morton, Piper, Poe, Porter, Read, Richards, Spangler, Steele, and Whitehill.——16.

The reſolution, fixing on the firſt Monday in January, was then carried with only one diſſenting voice, (Mr. Barton's.)

In Senate, April 2d, 1804, the following reſolution was moved by Mr. Pearſon, ſeconded by Mr. Reed, conſidered and adopted, viz :—

Resolved, That the Senate will meet at the Court-houſe, in the borough of Lancaſter, on the firſt Monday in January, 1805, and then and there commence the trial of Edward Shippen, Eſq. Chief Juſtice of the Supreme Court of Pennſylvania, and Jaſper Yeates, and Thomas Smith, Eſqr's. aſſiſtant Juſtices of the ſame Court, on the article of impeachment, exhibited againſt them by the Houſe of Repreſentatives, in their name, and the name of the people of Pennſylvania ; and that the Speaker be directed to iſſue an order, requiring them, the ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, Eſquires, to attend on the day aforeſaid, to anſwer to the article of impeachment aforeſaid ; and, that the ſaid order be ſerved on them, and a copy of the ſaid article of impeachment be delivered to each of them, the ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, Eſquires, at leaſt thirty days before the day appointed for trial.

In the Houſe of Repreſentatives, December 7th, 1804, a motion was made by Mr. Boileau and Mr. D. Mitchel, and read as follows, viz :—

Whereas, an article of impeachment has been preſented to the Senate by the late Houſe againſt Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court of Pennſylvania : Therefore,

Resolved, That the ſaid impeachment be proſecuted, and that a committee be appointed to manage the ſame on the part of this Houſe : That the committee be authorized to employ one or more counſel to attend the trial of the ſaid Juſtices of the Supreme Court, and aſſiſt thereat.

Laid on the table.

On motion of Mr. Boileau and Mr. Sheetz,

Ordered, That it be the firſt order for Monday next.

On Monday, the 10th of December, agreeably to the order of the day, the Houſe proceeded to the ſecond reading of the reſolution, relative to the impeachment of the Judges of the Supreme Court, read the 7th inſtant :

After ſome time, on the queſtion—"*Will the House agree to the same ?*"

The Yeas and Nays were called by Mr. Ogle and Mr. Patterſon, and are as follows, viz :—

YEAS.—Meſſrs. Adams, Agnew, Alſhouſe, Alter, Acheſon, Acker, Barclay, Beale, Boileau, Boyd, Briſbin, Bucher, Clarke, Crouch, Darlington, H. Davis, M. Davis, Deckert, Engle, Epler, Fenton, Ferguſon, Ferree, Findley, Fore, Goodman, Greſs, Groſs, Haines, Hall, Harriſon, Hendrix, Holgate, Jenkins, Laycock, Lytle, M'Comb, M'Connel, M'Cune, M'Kinney, Mechling, Mann, Marſhall, J. Mitchel, Moore, Odenheimer, Ogle, Patterſon, Pearſon, Rhoads, Robinſon, Rupert, Schneider, Sharſwood, Sheetz, J. Smith, S. Smith, Spangler, Stephenſon, Farr, Udree, Weirich, Wilſon, Witman, and S. Snyder, *speaker*.——65.

NAYS.—Meſſrs. Barnet, Bull, Cunningham, Helman, Ingham, Johnſon, Miller, Milnor, Pennock, Porter, Roberts, Shriver, Sloan, Trimble, Wells, and White.——16.

So it was determined in the affirmative ; and

Ordered, That Meſſrs. Boileau, Ferguſon, Bucher, Engle and Laycock, be a committee for that purpoſe.

In the Senate, December 4th, being the day appointed by the conſtitution for the meeting of the General Aſſembly, the Senate convened, and ſhortly after the appointment of a Speaker. Mr. Whitehill, the gentleman re-appointed to that office, informed the Senate that agreeably to their reſolution of the 2d of April laſt, he had iſſued precepts to be ſerved upon the three Judges of the Supreme Court mentioned in the ſaid reſolution ; which precepts, together with three copies of the articles of accuſation and impeachment againſt the ſaid Judges, were put into the hands of the Sergeant-at-arms of the Senate ; and that the Sergeant-at-arms has this day made return of the

ſervice of the ſaid precepts and article of accuſation and impeachment. A copy of the precepts was read as follows, viz:

PENNSYLVANIA, ſs.

The Commonwealth of Pennſylvania, to William Wilson, Sergeant-at-arms of the Senate.

We command you that you ſummon the honorable Edward Shippen, Eſquire, Chief Juſtice of the Supreme Court of Pennſylvania, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſociate Juſtices of the ſame Court, that they be, and appear, at the bar of our Senate, in the borough of Lancaſter, on the firſt Monday in January next, to anſwer an article of accuſation and impeachment, for a high miſdemeanor of the ſaid Chief Juſtice, and the aſſociate Juſtices aforeſaid, in their official capacities, exhibited againſt them by the Houſe of Repreſentatives, in their name, and in the name of the people of Pennſylvania, and have you then and there this precept.

(WITNESS.)

ROBERT WHITEHILL, Eſq. *Speaker of our ſaid Senate, at Lancaster, this 17th day of October*, 1804.

(ATTEST.)

GEORGE BRYAN, *Clerk of the Senate.*

In Senate, December 11th, 1804, the ſpeaker laid before the Senate, a letter from the Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſociate Juſtices of the Supreme Court, a copy of which is as follows, viz:—

Philadelphia, December 8th, 1804.

SIR,

We acknowledge to have received copies of the articles of impeachment againſt us, and of the ſummons, directed to your Sergeant-at-arms. We ſhall certainly attend on the day fixed upon.

We muſt now requeſt, that your honorable Houſe will iſſue compulſory proceſs, for the attendance of the following witneſſes, in our favor, viz: Moſes Levy, Eſq. Joſeph B. M'Kean, Eſquire, Edward Burd, Eſquire, John P. Ripley, Eſquire, Jacob Shoemaker, Thomas Henneſy, Edward Burd, Jun. Eſquire, William Cranmond, Philip Nicklin, Matthew Pierce, and James Lide.

Mr. J. Hubley, who will deliver you this letter, will receive the proceſs from you.

We are,
With reſpect ſir,
Your very obedient ſervants,
EDWARD SHIPPEN,
JASPER YEATES,
THOMAS SMITH.

The Honorable Speaker of the Senate.

Same day, on motion of Mr. Reed and Mr. Porter, the following reſolution was twice read, conſidered, and adopted, viz :

Reſolved, That a committee be appointed to make the neceſſary arrangements, previous to the trial of Edward Shippen, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, aſſiſtant Juſtices of the Supreme Court, on charges exhibited, and which ſhall be exhibited againſt them, by the Houſe of Repreſentatives.

Ordered, That Mr. Reed, Mr. Porter, Mr. Mayer, Mr. Heſton, and Mr. Montgomery, be a committee for that purpoſe.

On motion of Mr. Hart and Mr. Heſton, the letter from the Judges of the Supreme Court, read this day, was again read, and referred to the committee laſt appointed.

In Senate, Wedneſday, December 12, Mr. Reed, from the committee appointed for that purpoſe, made the following report, viz :—

The committee appointed to make the neceſſary arrangements, previous to the trial of Edward Shippen, Jaſper Yeates, and Thomas Smith, Eſquires, on charges exhibited, and which may be exhibited againſt them, by the Houſe of Repreſentatives, and, to conſider and report on their letter of the eighth inſtant, report, in part, and offer the following reſolution, viz.—

Reſolved, That the ſpeaker be, and he is hereby directed, to iſſue proceſs, on the application of the managers appointed by the Houſe of Repreſentatives, to conduct the impeachment, exhibited by ſaid Houſe, againſt Edward Shippen, Chief Juſtice, Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court of Pennſylvania; or, on the application of the ſaid Juſtices, reſpectively, to require the attendance of ſuch witneſſes, as either of the ſaid parties ſhall judge neceſſary.

On motion of Mr. Reed and Mr. Kean, and by ſpecial order, the report, in part of the committee, appointed to make the neceſſary arrangements, previous to the trial of Edward Shippen, Jaſper Yeates, and Thomas Smith, Eſquires, was again read, conſidered, and adopted.

Whereupon, the ſpeaker iſſued proceſs, agreeably to the application of the Judges, as contained in their letter.

In Senate, January 1, 1805, the clerk of the Houſe of Repreſentatives, preſented an extract from the Journal of that Houſe, a copy of which is as follows:—

"*In the Houſe of Repreſentatives,*

"*December* 31*ſt*, 1804.

"*Reſolved*, That the clerk of this Houſe, be directed to offer, to the ſpeakers and members of the Senate, the uſe of the chamber of the Houſe of Repreſentatives, during the trial of the article of impeachment, preferred againſt three of the Judges of the Supreme Court of this Commonwealth."

The committee appointed to make arrangements, previous to the trial of three of the Judges of the Supreme court—

Report, That the Senate will organize itſelf, as a Court of impeachment, agreeably to the conſtitution, on Monday morning, at ten o'clock, of the ſeventh inſtant, by the following oath or affirmation being adminiſtered to the ſpeaker and members reſpectively:—

"You do ſwear, or affirm, that in all things, appertaining to the trial of the impeachment, againſt Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court, you will do impartial juſtice, according to the conſtitution and laws of this Commonwealth."

That, thereupon, the Court will adjourn, to meet at eleven o'clock, of the ſame morning, in the chamber of the Houſe of Repreſentatives, to proceed on the trial of the impeachment, now pending.

That the Senate ſhall meet in their chamber, at ten o'clock, in the morning of each day, on Legiſlative buſineſs; and at eleven in the forenoon, adjourn, to meet in the chamber of the Houſe of Repreſentatives, to attend the trial of the impeachment.

That, during ſaid trial, any motion made by the parties, or their counſel, to the Court, ſhall be committed to writing, and read by the clerk of the Senate.

If a Senator put a queſtion to a witneſs, it ſhall be reduced to writing, and put by the ſpeaker.

The committee further recommend,

That the proceedings, on the impeachment, be noted and entered diſtinctly from the Journal of Legiſlative proceedings.

On the 3d of January, 1805, the report of the committee of arrangement was again read, amended as follows, and adopted:

In place of—"*If a Senator put a queſtion to a witneſs, it ſhall be reduced to writing, and put by the ſpeaker,*" infert—"*All queſtions put to witneſſes ſhall be through the ſpeaker; and, if required by him, reduced to writing.*"

In Senate, January 7, 1805, the Speaker laid before the Senate, a letter from Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court, a copy of which is as follows:

Lancaſter, January 7th, 1805.

SIR,

We have the honor to inform you, that, in obedience to the ſummons of the Senate, we attend to anſwer the article of impeachment, which has been exhibited againſt us.

It may be proper to appriſe you, that Meſſrs. Ingerſoll and Dallas will accompany us as counſel, upon this occaſion.

We are, reſpectfully,
Sir,
Your moſt obedient ſervants,

EDWARD SHIPPEN,
JASPER YEATES,
THOMAS SMITH.

The Honorable the Speaker of the Senate.

In purſuance of the reſolution of the Senate of the third inſtant, the Senate proceeded to organize itſelf as a Court of Impeachment.

Mr. Reed was appointed (in conformity with the act of the 19th of March laſt) to adminiſter the oath to the ſpeaker of the Senate, agreeably to the conſtitution, and the form adopted by the Senate, and the ſpeaker adminiſtered, to the members, a ſimilar oath or affirmation.

A meſſage was received from the Houſe of Repreſentatives, by Mr. Huſton, their clerk, to the following purpoſe, to wit:

That he was directed to inform the Court, that the chamber of the Houſe of Repreſentatives was ready for the Court to proceed on the trial of the impeachment.

Whereupon, on motion of Mr. Reed and Mr. Hart, the Court adjourned, in purſuance of the ſaid reſolution, to the chamber of the Houſe of Repreſentatives.

THE TRIAL.

JANUARY 7, 1805.

AT about 11 o'clock, the Senate as a Court of Impeachment, convened in the chamber of the Houſe of Repreſentatives.

PRESENT.

ROBERT WHITEHILL, Speaker of the Senate, and Preſident of the Court—from Cumberland.

John Porter, *James Gamble*, *Edward Heston*, *William Pennel*, } From the diſtrict of Philadelphia county & city, & county of Delaware.
Joſeph Hart, Bucks county.
John Richards, Montgomery.
John Kean, *Gabriel Heister*, } Berks and Dauphin.
John Heister, Cheſter,
John Steele, *Chriſtopher Mayer*, } Lancaſter.
William Reed, *Rudolph Spangler*, } York and Adams.
Daniel Montgomery, Northumberland.
Jonas Hartzel, *Thomas Mewhorter*, } Northampton, Wayne, & Luzerne.
James Harris, Mifflin, Lycoming, and Centre.
John Piper, Bedford, Huntingdon, and Somerſet.
James Brady, Weſtmoreland, Armſtrong, & Indiana.
Preſsly Carr Lane, Fayette and Greene.
Joſeph Vance, Waſhington.
Thomas Morton, Allegheny, Beaver, and Butler.
William M'Arthur, Crawford, Erie, Venango, Mercer, and Warren.

COUNSEL—for the proſecution,

CAESAR A. RODNEY, of the ſtate of Delaware.

The Judges entered the Court, at about 15 minutes paſt eleven. They were accompanied by Mr. Dallas, and ſeveral other gentlemen.

The Judges being ſeated, Mr. Whitehill, the Preſident of the Court, thus addreſſed them :—

Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court of Pennſylvania, you ſtand impeached by the Houſe of Repreſentatives of the Commonwealth of Pennſylvania, of a high miſdemeanor in the execution of your office. The impeachment will be read by the clerk.

Here Mr. Bryan, the clerk of the Senate, read the article of impeachment—for which, ſee introduction, page 14.

Immediately after the article of impeachment was read, *Chief Juſtice* SHIPPEN, roſe and ſaid, Mr. Speaker, I beg leave to deliver our plea and anſwer to this replication in writing.

The clerk then read the plea and anſwer as follows :—

"*The anſwer of Edward Shippen, Jaſper Yeates, and Thomas Smith, to the article of impeachment, exhibited againſt them by the honorable Houſe of Repreſentatives of the Commonwealth of Pennſylvania* :—

The ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, ſaving to themſelves reſpectively, all exceptions whatſoever, to the ſaid article, and the charges therein contained, ſeverally anſwer and ſay :

That, they are not jointly or ſeverally, guilty of all, or any of the matters in the ſaid article contained, in manner and form, as they are therein charged againſt them.

And they further, confidently aver, that, all and ſingular the things, which they have judicially done in the premiſes, were dictated by the pureſt motives of public juſtice, were warranted and juſtified by the conſtitution and known laws of the Commonwealth ; and, were free from all feelings and deſigns of favor, prejudice, cruelty, or oppreſſion.

(Signed) *EDWARD SHIPPEN,*
JASPER YEATES,
THOMAS SMITH.

(Signed) JARED INGERSOLL, } Counſel for the re-
A. J. DALLAS, } ſpondents."

Mr. BOILEAU, roſe on the part of the managers of the impeachment, and ſaid—

Mr. Speaker, The managers of the impeachment conceive it to be their duty before they file a replication to this plea, to conſult the Houſe of Repreſentatives; and they ſolicit for that purpoſe, time until to-morrow morning at 11 o'clock, to give in their replication.

The Court granted the time,—and adjourned until half paſt 11 o'clock to-morrow.

TUESDAY, January 8th, 1805.

The Court opened at half paſt eleven.——The Judges were accompanied by Meſſrs. Dallas and Ingerſol.

M. BOILEAU.—"Mr. Speaker, on behalf of the Houſe of Repreſentatives, I am inſtructed to offer a replication to the plea given yeſterday, in anſwer to the articles of impeachment."

The replication was preſented to the Preſident of the Court. It was then read by the clerk as follows:

"*In the House of Representatives, Jan. 8th*, 1805.

The Houſe of Repreſentatives of the Commonwealth of Pennſylvania, proſecutors on behalf of themſelves and the people of Pennſylvania, againſt Edward Shippen, Eſquire, Chief Juſtice, and Jaſper Yeates, and Thomas Smith, Eſquires, aſſiſtant Juſtices of the Supreme Court, reply to the anſwer of the ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, and aver, that the charges againſt the ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, *are true*; and that the ſaid Edward Shippen, Jaſper Yeates, and Thomas Smith, *are guilty of all and every* the matters contained in the article of accuſation and impeachment by the Houſe of Repreſentatives exhibited againſt them, in manner and form as they are therein charged; and this the preſent Houſe of Repreſentatives are ready to prove againſt them, at ſuch convenient time and place as the Senate ſhall appoint for that purpoſe.

SIMON SNYDER, *Speaker of the House of Representatives.*

Atteſted for Matthew Huſton, clerk of the Houſe of Repreſentatives.

ABNER WEBB, *Asst. Clk.*"

The clerk then read the rules adopted by the Senate, relative to motions and queſtions, as follows :

"During the trial of impeachment, any motion made by the parties, or their counſel, to the Court, ſhall be committed to writing, and read by the clerk of the Senate.

"All queſtions put to witneſſes, ſhall be through the Speaker; and, if required by him, reduced to writing."

Mr. BOILEAU.—"Mr. Speaker, I am authorized to ſtate, that the managers and their counſel, are now ready to proceed on the trial."

Mr. DALLAS.—"On the part of the Judges, we are prepared."

Mr. BOILEAU then roſe, and ſpoke as follows :—

Mr. Speaker, & Gentlemen of the Senate,

CONNECTED with the honor conferred upon me by the Houſe of Repreſentatives, as one of the managers to conduct this impeachment, is the arduous taſk of addreſſing you on the ſubject. I riſe with embarraſſment and diffidence, in a ſituation at once ſo novel, unpleaſant, and deeply intereſting. It is the firſt time in my life, ſir, that ever I appeared to ſpeak in a Court of Juſtice, and never did I riſe to ſpeak in any Aſſembly, ſo deeply impreſſed with a ſenſe of the importance of the cauſe, ſo deeply impreſſed with feelings of regret, for the reſpectable and venerable objects of this proſecution ; and I hope, they will believe my aſſertion, when I ſay, that to them, I owe no perſonal hoſtility. On the contrary, when I caſt my eyes on thoſe gentlemen, and recollect the reſpectable characters they have ſupported in life—when I recollect the vaſt importance of the queſtion on which they are now arraigned at the bar of this tribunal, I am almoſt overwhelmed with the idea. How imperious muſt be the neceſſity, and how intereſting to the people, is the deciſion which is to terminate this all-important trial. When I recollect the magnitude of this queſtion—a queſtion greater than ever was agitated in Pennſylvania before, I feel the moſt ſolicitous anxiety. The cauſe now before you, is without example, in the hiſtory of this country. The annals of Pennſylvania do not furniſh us with the example of the impeachment of one Judge of the Supreme Court, much leſs of three. It is not the mere delinquency of an inferior magiſtrate—it is not the trivial error of a magiſtrate more elevated—but it is to try the criminality of three of the Judges of the firſt Judicial Court in this Commonwealth, men who are venerable in years, and whoſe long lives and experience, ſhould have warned them againſt ſuch

act«. as they are called upon this day to anſwer. It is, indeed, an awful and imperious neceſſity, which this day calls upon us to proſecute, and it muſt, without doubt, be equally unpleaſant for you, gentlemen of the Senate, to decide between thoſe citizens at your bar, and the rights of our fellow-citizens, the rights of man, of our conſtitution, and of our country.

But, when I recollect, ſir, that a few days ago, I lifted up my hand, to the ſearcher of all hearts, and ſwore to perform my duty to my conſtituents, under the conſtitution and the laws; when I recollect, ſir, that I am addreſſing a Court, compoſed of men, choſen for the probity and integrity of their private and public lives, from various parts of the ſtate; men, who are alike ſuperior to private corruption, as well as to mere eloquence and ſophiſtry;—not a jury, ſelected by an hoſtile officer, or packed by a ſycophantic ſheriff,—I have nothing to fear, when I call upon them to be juſt. "Before ſuch a tribunal, no man who feels the *mens conscia recti* can have cauſe to fear."—But, when I feel, that I am pleading, not only for my own rights, but for their rights, for the rights of my fellow-citizens, and for the rights of man, which I feel have been violated by thoſe venerable gentlemen now at your bar, I do it with confidence that this honorable Court will vindicate thoſe rights, and ſee that the conſtitution and laws have been complied with.

Gentlemen of the Senate,

I feel a diffidence, on a queſtion of this magnitude, ariſing from the feebleneſs of my powers, to do it juſtice, and becauſe I know, that there are many, if not all, compoſing this honorable Court, whoſe age and experience, qualify them to form more correct opinions on the evidence and arguments which may be adduced. But, I ſhall endeavor to point out thoſe general and immutable principles, by which we ſhould be guided in this proſecution. Theſe principles, are ſimple and plain. Truth needs not the force of eloquence. No eloquence, no talents, are neceſſary to make truth impreſſive on the minds of intelligent men. The trial of this impeachment, ſir, is involved with the foundation of our liberties, and the ſecurity of our freedom.

Permit me to lead back your attention, to the all-important period of '76, and the objects which it embraced, and let me aſk what was the language of that day? When I look upon the members of the Senate, who compoſe this honorable Court, and ſee men whoſe venerable heads are bleached with virtuous years, I feel how much more capable they are to relate, than I am to conceive the origin of the glorious declaration, which previous oppreſſion produced, and the gallant and heroic ſtruggle by which it was ſupported. Although I was too young to engage in the perils of that glorious period, my boſom alſo

caught the ſacred flame—my heart felt the throb which was excited in every virtuous breaſt—What heart did not beat high—what cheek but flushed—and what eye did not ſparkle with moiſture, at the ſound of liberty and independence. Before that period, Mr. Speaker, the endearing name of liberty was rather worſhipped, than poſſeſſed. It was adored like the unſeen God. The idea of liberty, as we now poſſeſs it, was then only known in fable; it was conſidered as a viſionary ſcheme—a mere utopian ſcheme, which exiſted only in the brain of the viſionary, or ſpeculative philoſopher, and incapable of being realized. But the fortunate deſtiny was reſerved for America, to reduce to ſimple practice what other nations, for ages deemed impracticable. We then ſaw the people of Pennſylvania, and of the United States, as it were, in a ſtate of nature, diſavowing any earthly ſuperior, ſtep forth in all their majeſty, and declare by their immediate repreſentatives—"that all men are born free." We ſaw them conſult what form of government was eſſential to the happineſs of the people, and lay down principles of political and civil juſtice—formed out of the chaos of feudal and colonial barbariſm, and riſing, like another phœnix, from the ruins of the native element. Sir, when our patriots and our ſages aſſembled, for the purpoſe of eſtabliſhing a free government, the eyes of every man in Pennſylvania, and of every man in the univerſe, who felt for the happineſs of the human race, were directed towards us; and whilſt the tyrants groaned in agony, and gnaſhed their teeth, the friends of liberty looked up to us with hopeful ſolicitude. Sir, this was an object worthy of attracting the eye of him who is the great parent of the human race, and to look down with complacency from the pinnacle of heaven, upon his long oppreſſed children, and to ſee them burſting the bonds and ſhackles which attached a ſection of the globe to a mere ſpeck upon another hemiſphere, and uniting in the bonds of civil and ſocial virtue. Here it is, that we verify the ſaying—"man is the nobleſt work of God"—and a government founded on liberty, is the grandeſt, and the nobleſt work of man.

If we turn our eyes to that intereſting period and enquire what did the ſages of Pennſylvania do? We hear them, ſir, on the 15th of July, 1776, after the great example of the Congreſs of the Union, ſpeaking in this language:

"Whereas, all government ought to be inſtituted and ſupported for the ſecurity and protection of the community as ſuch, and to enable the individuals who compoſe it, to enjoy their natural rights, and the other bleſſings which the author of exiſtence has beſtowed upon man; and, whenever theſe great ends of government are not obtained, the people have a right, by common conſent, to change it, and take ſuch meaſures as to

them may appear neceſſary to promote their ſafety and happineſs. And, whereas the inhabitants of this Commonwealth have, in conſideration of protection only, heretofore acknowledged allegiance to the King of Great Britain; and the ſaid King has not only withdrawn that protection, but commenced, and ſtill continues to carry on, with unabated vengeance, a moſt cruel and unjuſt war againſt them, employing therein, not only the troops of Great Britain, but foreign mercenaries, ſavages and ſlaves, for the avowed purpoſe of reducing them to a total and abject ſubmiſſion to the deſpotic domination of the Britiſh Parliament, with many other acts of tyranny, (more fully ſet forth in the declaration of Congreſs) whereby all allegiance and fealty to the ſaid King and his ſucceſſors, are diſſolved, and at an end, and all power and authority derived from him, ceaſed in theſe colonies. And, whereas, it is abſolutely neceſſary, for the welfare and ſafety of the inhabitants of ſaid colonies, that they be henceforth free and independent ſtates, and that juſt, permanent and proper forms of government exiſt in every part of them, derived from and founded on the authority of the people only, agreeably to the directions of the honorable American Congreſs. We, the repreſentatives of the freemen of Pennſylvania, in general convention met, for the expreſs purpoſe of framing ſuch a government, confeſſing the goodneſs of the great Governor of the Univerſe, (who alone knows to what degree of earthly happineſs mankind may attain, by perfecting the arts of government) in permitting the people of this ſtate, by common conſent, and without violence, deliberately to form for themſelves ſuch juſt rules as they ſhall think beſt for governing their future ſociety; and being fully convinced, that it is our indiſpenſible duty to eſtabliſh ſuch original principles of government, as will beſt promote the general happineſs of the people of this ſtate, and their poſterity, and provide for future improvements, without partiality for, or prejudice againſt any particular claſs, ſect, or denomination of men whatever, do, by virtue of the authority veſted in us by our conſtituents, ordain, declare and eſtabliſh the following declaration of rights, and frame of government, to be the conſtitution of this Commonwealth, and to remain in force therein forever, unaltered, except in ſuch articles as ſhall hereafter on experience be found to require improvement, and which ſhall by the ſame authority of the people, fairly delegated as this frame of government directs, be amended or improved, for the more effectual obtaining and ſecuring the great end and deſign of all government, herein before mentioned."

Theſe are the ſentiments, which operated on the minds of thoſe patriots who laid the foundation of free government, and formed a conſtitution for the commonwealth. We ſee, ſir, the regard they poſſeſſed for preſerving the life, liberty, and pro-

perty of the citizen. The firſt ſentiments which they expreſs in the declaration of rights, are theſe: "Sect. 1. That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongſt which are, the enjoying and defending of life and liberty" [what is life, without liberty?] "acquiring, poſſeſſing and protecting property, and purſuing and obtaining happineſs and ſafety."

Thus we ſee, ſir, that the primary conſiderations in the view of the ſages who framed our government, were the ſecurity of life, liberty, property and happineſs, and theſe they have kept conſtantly in view, throughout the whole declaration of rights. We read next, "Article 4. That all power being originally inherent in, and conſequently derived from the people; therefore all officers of government, whether legiſlative or executive, are their truſtees and ſervants, and at all times accountable to them."

That all power being originally derived from the people, therefore all officers are, at all times, accountable to them.

5. "That government is, or ought to be, inſtituted for the common benefit, protection and ſecurity of the people, nation or community; and not for the particular emolument or advantage of any ſingle man, family, or ſet of men, who are a part only of that community: And, that the community hath an indubitable, unalienable, and indefeaſible right to reform, alter, or aboliſh government, in ſuch manner as ſhall be by that community judged moſt conducive to the public weal."

6. "That thoſe who are employed in the legiſlative and executive buſineſs of the ſtate, may be reſtrained from oppreſſion, the people have a right, at ſuch periods as they may think proper, to reduce their public officers to a private ſtation, and ſupply the vacancies by certain and regular elections."

8. "That every member of ſociety hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his perſonal ſervice when neceſſary, or an equivalent thereto: But no man's property can be juſtly taken from him, or applied to public uſes, without his own conſent, or that of his legal repreſentatives: Nor can any man, who is conſcientiouſly ſcrupulous of bearing arms, be juſtly compelled thereto, if he will pay ſuch equivalent; nor are the people bound by any laws, but ſuch as they have in like manner aſſented to, for their common good."

Almoſt in every line, we ſee that the liberty of the citizen, is provided for, and the protection of his rights guaranteed.

9. "That in all profecutions for criminal offences, a man hath a right to be heard by himſelf and his counſel, to demand the cauſe and nature of his accuſation, to be confronted with the witneſſes, to call for evidence in his favor, and a ſpeedy public trial, by an impartial jury of the country, without the unanimous conſent of which jury he cannot be found guilty; nor can he be compelled to give evidence againſt himſelf; nor can any man be juſtly deprived of his liberty, except by the laws of the land, or the judgment of his peers."

12. "That the people have a right to freedom of ſpeech, and of writing, and publiſhing their ſentiments; therefore, the freedom of the preſs ought not to be reſtrained."

14. "That a frequent recurrence to fundamental principles, and a firm adherance to juſtice, moderation, temperance, induſtry and frugality, are abſolutely neceſſary to preſerve the bleſſings of liberty, and keep a government free: The people ought, therefore, to pay particular attention to theſe points in the choice of officers and repreſentatives, and have a right to exact a due and conſtant regard to them, from their legiſlators and magiſtrates, in making and executing ſuch laws as are neceſſary for the good government of the ſtate."

Theſe, ſir, are the ſentiments expreſſed by thoſe fathers of our country, when they ſhook off the yoke, and dared all dangers for their poſterity. In almoſt every line, we diſcover that *liberty* is the pervading ſound. They had before them the experience and the hiſtory of all ages—they guarded againſt the errors of others, and in the diſtribution of the various powers of government, guarded againſt the introduction of thoſe cauſes of affliction, which might accumulate againſt the life, liberty, and property of the citizen. The frame of our conſtitution, is governed by that idea, and the powers are thus diſtributed in the plan of government.

Sect. 2. "The ſupreme legiſlative power ſhall be veſted in a Houſe of Repreſentatives of the freemen of the Commonwealth of Pennſylvania."

Sect. 3. "The ſupreme executive power ſhall be veſted in a Preſident and Council."

Sect. 4. "Courts of Juſtice ſhall be eſtabliſhed in the city of Philadelphia, and in every county of this ſtate."

Jealous, however, that the legiſlative body, although choſen annually by the people, might arrogate too much power, they provided that all bills ſhould be printed for the public information.

SECT. 15. "To the end that laws before they are enacted may be more maturely conſidered, and the inconvenience of haſty determinations as much as poſſible prevented, all bills of public nature ſhall be printed for the conſideration of the people, before they are read in General Aſſembly, the laſt time, for debate and amendment; and, except on occaſions of ſudden neceſſity, ſhall not be paſſed into laws until the next ſeſſion of Aſſembly; and, for the more perfect ſatisfaction of the public, the reaſons and motives for making ſuch laws, ſhall be fully and clearly expreſſed in the preambles."

Again we find, as if this idea was firſt in the mind of our enlightened ſages. We find, that altho' the Judges of the Supreme Court were commiſſioned only for ſeven years, and removable for miſbehavior, at any time, by the Aſſembly, it is declared in ſection 39, that "exceſſive bail ſhall not be exacted for bailable offences, and all fines ſhall be moderate." Nay, ſo careful were they of perſonal liberty, that they declared "the perſon of a debtor, when there is not a ſtrong preſumption of fraud, ſhall not be continued in priſon."

Notwithſtanding all theſe proviſions, we find that they are ſtill jealous, leſt all this power delegated to the government, ſhould be exerciſed againſt them; therefore, a council of cenſors were eſtabliſhed to act as a ſtill further controul.

SECT. 47. "In order that the freedom of the Commonwealth may be preſerved inviolate forever, there ſhall be choſen by ballot by the freemen in each city and county, reſpectively, on the ſecond Tueſday in October, in the year one thouſand ſeven hundred and eighty-three, and on the ſecond Tueſday in October, in every ſeventh year thereafter, two perſons in each city and county of this ſtate, to be called the Council of Cenſors; who ſhall meet on the ſecond Monday of November next, enſuing their election, the majority of whom ſhall be a quorum, in every caſe, except as to calling a convention, in which two thirds of the whole number elected ſhall agree: And whoſe duty it ſhall be to enquire, whether the conſtitution has been preſerved inviolate in every part; and whether the legiſlative and executive branches of government have performed their duty as guardians of the people, or aſſumed to themſelves, or exerciſed other or greater powers than they are entitled to by the conſtitution."

We find that, agreeably to this proviſion, the council of cenſors did meet, for the purpoſe of examining whether the powers of government were faithfully exerciſed. Permit me to read a few extracts from their proceedings. The conſtitution

provided, that "trials by jury shall be as heretofore." The censors find that—

"Chapter 45 of Vol. II. of acts of Assembly, passed December 3d, 1782, enabling the president and council to direct the trial of those who should be charged with treasonably setting up a new and independent government within Pennsylvania, to be in another county, than that in which the facts were done, is unconstitutional."

"Trial by jury is taken away, in the case of harboring deserters from the armies of the United States; and the offenders subjected to summary conviction, and to whipping——Vol. 1. Chap. 9. Sect. 3. The same is done, in case of harboring deserters from the ships of war, of his most Christian Majesty. The offenders are liable to a fine of 30*l.* on the summary judgment of his two Justices of the Peace, and the certiorari denied.——Vol. 2. Chap. 59. Sect. 2."

"The jurisdiction of the Court of Admiralty, which proceeds without a jury, is brought upon the land, and extended to the demands of artificers, who build or repair ships and vessels. Besides, it may with justice be apprehended, that this new embarrassment, upon this kind of moveable property, will deter foreigners from trusting their vessels into our port.——Vol. 2. Chap. 134.

"It is the opinion of this committee, that the acts of Assembly, which restrained for a time, the full operation of the writ of habeas corpus, are infringements of the constitution."

"The frequent interposition of the Legislature, in behalf of particular persons, (held in execution for debt) may, all of them, be justly branded with the appellation of *laws after the fact*—whereas this section calls for general regulations; by a general law, which may be known before the contracts be made. These acts of mercy to individuals, too often dependent upon favor or prejudice, before large bodies of men, will probably bring us into discredit, if not into disputes with foreign nations. They ought to be abandoned immediately, and a general law provided."——*(Report of censors.)*

Thus you see, sir, that the whole burden of the song is, that the preceding Legislature had violated their powers, and that the liberties of the people had been invaded; and, perceiving that although they could censure and recommend such measures as were salutary, they had no authority to chastise the officers, in the various departments of government, who had violated the constitution; this, and other coincident causes produced a dis-

position for calling another convention, in order more effectually to secure the rights of the citizen. In corroboration of this, permit me to read the following from the proceedings of the new convention, December 9th, 1789.

A motion was made by Mr. James Rofs, ſeconded by Mr. Timothy Pickering, to introduce the following reſolution :—

Reſolved, That that part of the conſtitution of this Commonwealth, called a *declaration of the rights of the inhabitants of the Commonwealth or ſtate of Pennſylvania*, requires alterations and amendments, in ſuch manner as that the rights of the people reſerved and excepted out of the general powers of government, may be more accurately defined and ſecured, and the ſame andſuch other alterations and amendments as may be made in theſaid conſtitution, be made to correſpond with each other."

By this you will ſee, ſir, that the primary object appears to have been perſonal liberty and the rights of man, and it was under that view, that the meaſure was finally agreed to. Under this impreſſion, we ſee them framing the conſtitution, under which we now act. Here, ſir, we find them acting upon the idea adopted by the council of cenſors, and with the view of preventing encroachments upon the liberties of the people, they begin by ſaying that "the Legiſlative power of this Commonwealth ſhall be veſted in a General Aſſembly, which ſhall conſiſt of a Senate and Houſe of Repreſentatives." They found, ſir, that the people were willing to place another check upon the inroads of illegal power, by eſtabliſhing two branches in the Legiſlature. And, again, ſir, to guard more effectually againſt encroachment, they declared that the ſupreme executive power ſhould be veſted in a Governor, with a qualified negative upon the acts of the Legiſlative branches.

Again, with a deſign to prevent, as far as poſſible, the enacting of ſuch laws, whereby the right of jury trial had been taken away from them, the judicial powers were particularly defined. The 5th article of the conſtitution declares, that "the judicial power of this Commonwealth, ſhall be veſted in a Supreme Court, Court of Oyer and Terminer, Court of Common Pleas, &c.

"The Judges of the Supreme Court, ſhall hold their offices during good behavior ; but, for any reaſonable cauſe, the Governor may remove any of them, on the addreſs of two thirds of each branch of the Legiſlature," &c.

Here, ſir, the Judges are made more independent, than under the former conſtitution, more independent, perhaps, than is conſiſtent with free government ; their ſalaries are ample, and cannot be reduced.

Having thus ſhewn how they are eſtabliſhed by the conſtitutional power, let us now advert to the Bill of Rights to the conſtitution, under which we are now acting:

ARTICLE IX.

"That the general, great, and eſſential principles of liberty and free government, may be recognized and unalterably eſtabliſhed, *WE DECLARE*,

SECT. 1. "That all men are born equally free and independent, and have certain inherent and indefeaſible rights, among which are thoſe of enjoying and defending life and liberty, of acquiring, poſſeſſing, and protecting property and reputation, and of purſuing their own happineſs."

SECT. 2. "That all power is inherent in the people, and all free governments are founded on their authority, and inſtituted for their peace, ſafety and happineſs: For the advancement of thoſe ends, they have, at all times, an unalienable and indefeaſible right to alter, reform, or aboliſh their government in ſuch manner as they may think proper."

SECT. 6. "The trial by jury, ſhall be as heretofore, and the right thereof remain inviolate."

SECT. 7. That the printing preſſes ſhall be free to every perſon, who undertakes to examine the proceedings of the Legiſlature, or any branch of government: And no law ſhall ever be made to reſtrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man; and every citizen may freely ſpeak, write and print on any ſubject, being reſponſible for the abuſe of that liberty. In proſecutions for the publication of papers, inveſtigating the official conduct of officers, or men in a public capacity, or where the matter publiſhed is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury ſhall have a right to determine the law and the facts, under the direction of the Court, as in other caſes."

SECT. 8. "That the people ſhall be ſecure in their perſons, houſes, papers & poſſeſſions, from unreaſonable ſearches and ſeizures; and that no warrant, to ſearch any place, or to ſeize any perſon or things, ſhall iſſue without deſcribing them as nearly as may be, nor without probable cauſe, ſupported by oath or affirmation."

SECT. 9. That, in all criminal proſecutions, the accuſed hath a right to be heard by himſelf and his counſel, to demand the nature and cauſe of the accuſation againſt him, to meet the witneſſes face to face, to have compulſory proceſs, for obtain-

ing witneſſes in his favor, and, in proſecutions by indictment or information, a ſpeedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence againſt himſelf, nor can he be deprived of his life, liberty, or property, unleſs by the judgment of his peers, or the law of the land."

SECT. 10. "That no perſon ſhall, for any indictable offence, be proceeded againſt criminally by information, except in caſes ariſing in the land or naval forces, or in the militia when in actual ſervice in time of war or public danger, or, by leave of the Court, for oppreſſion and miſdemeanor in office. No perſon ſhall, for the ſame offence, be twice put in jeopardy of life or limb: nor ſhall any man's property be taken or applied to public uſe without the conſent of his Repreſentatives and without juſt compenſation being made."

SECT. 12. "That no power of ſuſpending laws ſhall be exerciſed, unleſs by the Legiſlature or its authority."

SECT. 13. "That exceſſive bail ſhall not be required, nor exceſſive fines impoſed, nor cruel puniſhments inflicted."

SECT. 14. "That all priſoners ſhall be bailable by ſufficient ſureties, unleſs for capital offences when the proof is evident or preſumption great; and the privilege of the writ of Habeas Corpus ſhall not be ſuſpended, unleſs when, in caſes of rebellion or invaſion, the public ſafety may require it."

SECT. 16. "That the perſon of a debtor, where there is not ſtrong preſumption of fraud, ſhall not be continued in priſon after delivering up his eſtate for the benefit of his creditors in ſuch manner as ſhall be preſcribed by law."

SECT. 26. "To guard againſt tranſgreſſions of the high powers which we have delegated, WE DECLARE, That every thing in this article, is excepted out of the general powers of government, and ſhall for ever remain inviolate."

I ought to apologize, ſir, for treſpaſſing ſo much upon the patience of this honorable Court, but I thought it eſſential to trace the origin and progreſs of our government, and the principles upon which it has been founded.

Thus, ſir, by a curſory view of the old conſtitution, as well as by a view of the preſent conſtitution, it will appear, that the protection of the liberty of the citizen, has always formed an indiſpenſable feature, and has never been loſt ſight of. The preſent conſtitution, like every other human work, bears the

mark of imperfection. Perhaps no man, nor ſet of men, could have made a better under all the attendant circumſtances; and great care has been taken to ſecure the rights of the people. But all theſe guards, all theſe bulwarks, to ſave the liberties of the citizen, have been thrown down, and trampled under foot, by thoſe who ought to have been their ſupporters. But, I hope, ſir, that this day may prove auſpicious to the liberties of the people;—and it is to you, gentlemen of the Senate, that we now look, as the guardians of thoſe rights—that you will do juſtice to an injured people, and that you will not ſuffer their rights to be trampled upon with impunity. Gentlemen, never was there a matter of greater importance ſubmitted to the conſideration of a public body. The queſtion is, ſhall we hold our liberties by the ſacred tenure of the conſtitution, or by the uncertain tenure, or capricious will of an angry Judge, or Judges. This conſtitution is the rule by which we are all to be governed. By this, my conduct is to be teſted; by this, the conduct of the Houſe of Repreſentatives will be teſted; and, by this conſtitution, will the meaſures of this Senate be teſted. The eyes of our conſtituents are upon us, and they expect from us, and from you all that juſtice requires, and the conſtitution authorizes. This conſtitution, is in the hands of every man; it needs not any extraordinory talents to underſtand it; it is plain and comprehenſible. Not like the Roman tyrant, who wrote his laws with a type ſo ſmall, and elevated them ſo high, that even the eagle eye of a lawyer could not read them. This conſtitution will juſtify you, in rigidly examining the conduct of thoſe who are now arraigned at your bar; and, it is by the deciſion that you will give upon this all-important ſubject, that you will be judged. In almoſt every part of this conſtitution, you will perceive the jealouſy of the people for their rights. No man, ſir, in Pennſylvania, can be addreſſed in this way—"*You can do no wrong.*" That only belongs to the King, and is an attribute unknown among freemen. You, gentlemen, muſt be amenable to to the ſovereign people, for all your public conduct. We, the members of this Houſe, every year muſt be tried by that great tribunal. Let them try us every year—and, let them try you, gentlemen, every four years—and it muſt be grateful to our feelings, that in diſcharging the important, tho' painful duties now devolved on us all, we have only to adhere to this conſtitution, and be teſted by it.

From this curſory view, therefore, of the conſtitution, and of the duties it preſcribes to us, this all-important inference is deduced, that perſonal liberty was the principal feature—the pole-ſtar of the firſt convention. But in the convention which formed the preſent conſtitution, it ſeems to have gained additional ſtrength.

Before I proceed to ſtate the facts, upon which the preſent accuſation is founded, permit me to advert to that part of the conſtitution, which gives us as members of the Houſe of Repreſentatives, the power of bringing impeachments, and you the power of trying them. The firſt ſection of the fourth article of the conſtitution ſays—

"The Houſe of Repreſentatives ſhall have the ſole power of impeaching."

SECT. 2. "All impeachments ſhall be tried by the Senate."

Thus, it appears to have been the object of the framers of the conſtitution, to place no man above it, and for that purpoſe they eſtabliſhed a competent tribunal, for the trial of all thoſe who might attempt to ſubvert it. Even the Governor, is amenable to this tribunal. It cannot be ſaid even of the Governor, that he can do no wrong. We cannot ſay to him—"You can do no wrong." No, ſir, if he acts in contravention to the principles of the conſtitution, you are bound to bring him to your bar. We are bound to watch even him, and upon complaint being made, you are bound to judge him. We can ſay to him, exalted as you are by the public confidence, you are not to exceed the bounds of the conſtitution. You are not exempted from the ſcrutiny of your conſtituents.

SECT. 3. "The Governor and other civil officers under this Commonwealth, ſhall be liable to impeachment."

All civil officers in the government, are therefore ſubject to impeachment; and you, Mr. Speaker, and gentlemen of the Senate, are inveſted with the high and neceſſary power to hear accuſations, and to ſit in judgment upon them;—and the ſolemity and importance of the preſent occaſion, calls for your moſt ſerious attention.

What we are about to ſubmit to you, is a charge of high miſdemeanor in office, a diſregard of the duties to which they were moſt ſolemnly bound, by Edward Shippen, Chief Juſtice, Jaſper Yeates, and Thomas Smith, aſſociate Juſtices of the Supreme Court. It appears from the evidence taken by the Houſe of Repreſentatives, and which the managers on their behalf, and on behalf of the good people of this Commonwealth, are about to prove, that an amicable ſuit was entered into on the 13th of July, 1802, on a conteſted policy of inſurance. Both parties having choſen their man, as referees, with power in caſe they diſagreed, to chooſe an umpire. The referees not agreeing, *William Haslet* was choſen umpire, who, with one of the referees, reported on the 6th of Aug. 1802, an award in fa-

ver of Thomas Paſſmore, which was filed in the Prothonotary's office, on the ſame day, and judgment entered thereon. On the 18th of the ſame month, execution was iſſued, and on the ſame day, a levy made by the ſheriff, on the goods of Andrew Bayard, one of the defendants. On the 4th day of September following, exceptions were filed by Andrew Bayard, againſt the deciſion of the referees. On the 8th of the ſame month, a paper was poſted up in the coffee-houſe, in the city of Philadelphia, ſaid to be a libel againſt Pettit and Bayard, in the following words :—

'The subscriber publicly declares, that Pettit and Bayard, of this city, 'merchants, and quibbling underwriters, has basely kept from the subscri-'ber, for nine months, about five hundred dollars, and that Andrew Bayard, 'the partner of Andrew Pettit, did, on the third or fourth instant, go before 'John Inskeep, Esq. alderman, and swore to that which was not true, by 'which the said Pettit and Bayard are enabled to keep the subscriber out of 'his money for about three months longer; and the said Bayard has mean-'ly attempted to prevent others from paying the subscriber about two thou-'sand five hundred dollars—but in this mean dirty action, he was disappoint-'ed: I therefore, do publicly declare, Andrew Bayard, a liar, a rascal, and 'a coward; and I do offer two and a half per cent. to any good person or 'persons, to insure the solvency of Pettit and Bayard, for four months from 'this date.

'THOMAS PASSMORE.

'*Philadelphia, September 8th*, 1802.'

For which alledged libel, Thomas Paſſmore was committed to the ſheriff of Philadelphia county, and confined in the debtors apartment of the common jail for 30 days, and fined 50 dollars for an alledged contempt of Court.

We ſhall prove to you, ſir, and it will appear in evidence, that certain interrogatories were filed by the counſel of Pettit and Bayard, and that Mr. Paſſmore anſwered the ſaid interrogatories in full, and, in our opinion completely purged the contempt, if any was actually committed. It further appears, that the Court, in the firſt inſtance, deviated from the uſual mode of procedure, and that atonement to Mr. Bayard, or immediate ſentence, was the only alternative left for Mr. Paſſmore. The Judges told him, that if he would make conceſſions to Mr. Bayard, it would do away the neceſſity of paſſing ſentence.

We ſhall prove that the chief of theſe things are true. It will appear in evidence, that there was no cauſe pending in Court between Thomas Paſſmore, and Pettit and Bayard, at the time of writing, or poſting the ſuppoſed libel—there conſequently could be no contempt, even if the odious doctrine of contempts extended to acts done out of the view of the Court. That, even if Thomas Paſſmore, by his anſwers to the interrogatories, did not purge the contempt, the Judges acted in an arbitrary, cruel, and oppreſſive manner, in which they were not war-

ranted by the conſtitution and known laws of Pennſylvania, and have therefore been guilty of a high miſdemeanor.

We ſhall prove to you, ſir, that every charge in the article of impeachment, is ſubſtantially true, and that the Judges of the Supreme Court, now at your bar, are juſtly chargeable with the offences, of which they now ſtand impeached :

1. Becauſe the publication did not reflect upon the Judges, either in their judicial capacity, or perſonal characters.

2. Becauſe there was no direct alluſion, in the paper called a libel, to any cauſe pending before the Court.

3. Becauſe, as appears from the record, Thomas Paſſmore was warranted in the concluſion, that the ſuit, between him and Pettit and Bayard, was then ended ; judgment having been entered, and execution iſſued.

4. Becauſe the judgment was not ſet aſide, until after the term of his impriſonment had expired, and after his application to the Legiſlature for the impeachment of the Judges.

5. Becauſe the Court were ſatisfied with the anſwers of Thomas Paſſmore, to the interrogatories, ſo far as reſpected the alledged contempt againſt themſelves.

6. Becauſe the puniſhment was inflicted, not becauſe Mr. Paſſmore had committed a contempt of Court ; but becauſe he would not apologize, or make atonement to Mr. Andrew Bayard, as the Court had directed.

Such proceedings, ſir, are unknown in the annals of juriſprudence, and appear better adapted to other forms of government than to ours ; for here the liberty of the individual, however humble he is in ſociety, is as ſacred as the moſt exalted and moſt opulent. Theſe proceedings, ſir, are totally unjuſtifiable, and are not warranted by the conſtitution and known laws of the land.

I rejoice, Mr. Speaker, that this queſtion is to be decided, at a time when party ſpirit, that fell deſtroyer of the peace of ſociety is ſcarcely perceptible. That this cannot be conſidered, as a political diſpute ; that the parties were not hoſtile to each other, on the ſcore of politics. My wiſh is, and I am authorized to ſay that it is the wiſh of the Houſe of Repreſentatives, of the counſel who has honored us with his profeſſional aid on this occaſion, and of the people generally, that this trial may be conducted with impartiality, unruffled by paſſion or

prejudice, and you will be governed only by a regard for equal and impartial juſtice. We are perſuaded, gentlemen, that you come to this trial with unbiaſſed minds, as pure as the white mantle that now enſhrouds our fields, unſullied by the touch of man.

I aſk pardon for conſuming time, which might be more uſefully filled up by the gentleman who is to conduct the proſecution of this article of impeachment. For myſelf, and for the managers of this impeachment, I thank you for the kind & patient attention you have been pleaſed to pay to my obſervations. Attend, gentlemen, to this important cauſe. Nay, I am ſure you will attend to it, under the ſolemn impreſſions of your ſacred oaths, and under the moſt impreſſive conſiderations of the vaſt importance of your deciſion. With this view, I reſt confident that the reſult of your deliberations, will meet the approbation of your conſtituents.

Mr. RODNEY.—Mr. Speaker, and gentlemen of this honorable Court, you have heard the ſtatement that has been made by one of the managers. In order to lay before you the principles of the article of impeachment againſt Edward Shippen, Jaſper Yeates, and Thomas Smith, Eſquires, I ſhall exhibit in the firſt place, the record of the Supreme Court, or at leaſt ſo far as I think it will bear on the preſent caſe, relative to the action between Pettit and Bayard, and Thomas Paſſmore :

Pleas before the Honorable Edward Shippen, Esquire, Doctor of Laws, Chief Justice, and his associate Justices, of the Supreme Court of the Commonwealth of Pennsylvania, of the term of September, in the year of our Lord, MDCCCII.

We, the underwriters on the body, tackle, &c. of brig Minerva, Jonathan Lambert, maſter, inſured by Thomas Paſſmore, in the office of Shoemaker and Berrett, by a policy dated September 30th, 1801, hereby agree to abide by the award to be given by Mathew Pearce and Hugh Henry, in an action wherein the ſaid Thomas Paſſmore is plaintiff, and Andrew Pettit and Andrew Bayard are defendants, and authorize and empower Jared Ingerſoll or any other attorney of the Supreme Court, to confeſs judgment againſt us for any ſum in proportion to our ſeveral ſubſcriptions, that may be awarded againſt the ſaid Pettit and Bayard ; and I, Thomas Paſſmore, do alſo agree, that the award of the ſaid referees, ſhall be valid againſt me, and authorize Jared Ingerſoll, or any other attorney, to confeſs judgment againſt me, in any action or actions that I may bring againſt any or all the underwriters who ſhall ſign

this agreement. *In witness whereof*, the ſaid parties have hereunto ſet their hands, this twelfth day of July, 1802.

THOMAS PASSMORE,
PETTIT & BAYARD,
WILLIAM CRAMOND,
FOR PHILIPS CRAMOND & CO.
JAMES LYLE,
NICKLIN & GRIFFITH.

Thomas Passmore,
Verſus
Andew Pettit & Andrew Bayard, trading under the firm of Pettit and Bayard.
} Supreme Court of Pennſylvania.—Caſe, with writ returnable, Sept. term—1802. Sur. policy of inſurance.

It is mutually agreed between plaintiff and defendants in this action, that all matters in variance between them, ſhall be referred to Hugh Henry and Mathew Pearce, who, if they cannot agree, are to make choice of a third perſon as an umpire, who are to hear and determine upon the merits of the diſpute, and the report of any two of whom after a full and fair inveſtigation is to be made into the prothonotary's office—upon which judgment is to be entered. Rule, if either party refuſes or neglects to appear on one day's notice the referees may proceed exparte.

Let this action be made, and the rule made conformably to the agreement on the other side.

S. LEVY, Atty. p. plaintiff.
13*th July*, 1802.

EDWARD BURD, Esq.

I, Edward Burd, prothonotary of the Supreme Court aforeſaid, hereby certify, that the above agreement and order of Mr. Sampſon Levy, as to the form of entering the ſame on record, were filed in my office, on the thirteenth day of July, eighteen hundred and two. In purſuance whereof, the following entry was made on the record of the ſaid Court.

Thomas Passmore,
Verſus
Andrew Pettit & Andrew Bayard, trading under the firm of Pettit & Bayard.
} In the Supreme Court of Pennſylvania, of Sept. term, 1802.

'Amicable action entered by agreement filed 13th July, '1802, and by the ſame agreement, all matters in variance be-

'tween the parties are referred to Hugh Henry and Matthew 'Pearce, who, if they cannot agree, are to make choice of a 'third perſon as an umpire, who are to hear and determine upon 'the merits of the diſpute, and the report of any two of them 'after a full and fair inveſtigation to be made into the protho-'notary's office, and judgment entered thereon. Exparte rule, 'on one day's notice.'

I further certify, that on the ſixth Auguſt, eighteen hundred and two, a report in ſaid action, was filed in my office, in the following terms, viz:—

'We, the ſubſcribers, (William Haſlett, being appointed by 'Meſſrs. Henry and Pearce) after a full and fair inveſtigation 'of the ſubject—do award for the plaintiff in the above caſe, 'four hundred and ninety dollars with intereſt.'

HUGH HENRY.
WILLIAM HASLET.

And, that on the ſame ſixth day of Auguſt, eighteen hundred and two, the following entry was made on the record of ſaid Court—

'6th Auguſt, 1802, judgment on report ſec reg.' and that on the eighteenth Auguſt, eighteen hundred and two, a paper whereof the following is a true copy, was filed in my office.

Thomas Passmore, Verſus *Andrew Pettit & Andrew Bayard.* } Supreme Court of Pennſylvania. Amicable action, caſe.

By virtue of a warrant of attorney filed in the office of Edward Burd, Eſquire, prothonotary, ſigned by the defendants, I do hereby confeſs judgment againſt them, for the ſum of four hundred and ninety dollars, the ſum awarded by the referees.

SAMPSON LEVY.

18th August, 1802.

And that, thereupon, the following entry was made on the records of the ſaid Court:

'18th Auguſt, 1802, Mr. S. Levy, by virtue of a warrant 'of attorney, contained in ſaid agreement, to enter the action, 'confeſs judgment for the ſum awarded by the referees.'—

I further certify, that thereupon on the nineteenth day of Aug. Anno Domini, eighteen hundred and two, a writ of Fieri Facias iſſued, to the ſheriff of Philadelphia county directed, to which no return has been made; and, that on the fourth day of September, eighteen hundred and two, exceptions to ſaid report, with an affidavit thereto ſubſcribed, were filed in my office in the following terms, viz:—

Thomas Passmore,
verſus
Andrew Pettit & Andrew Bayard.

Exceptions to the report of referees in the above caſe—

First. For, that the ſaid referees had a meeting on the ſubject of the reference with the plaintiff, when the defendants were not preſent nor notified; but one of the defendants going into a room to find a friend, diſcovered the plaintiff engaged in ſhewing his papers to the referees.

Secondly. For, that the plaintiff communicated to the referees, his affidavit, of what another perſon told him, reſpecting the object of the reference, in the abſence of the defendants, and without the ſame having been communicated to them, or either of them, by the plaintiff.

Thirdly. For, that the referees have allowed a claim for a total loſs on an inſurance upon a ſhip, although the plaintiff did not produce the account of the expences incurred for repairs, and the defendants, or one of them, deſired the referees not to come to a concluſion in the buſineſs, until ſuch accounts were produced by the plaintiff.

Fourthly. For, that the referees have decided in favor of the plaintiff, when they ought to have decided in favor of the defendants.

J. INGERSOLL, for defendants.

Philadelphia, September 3d, 1802.

Andrew Bayard, one of the defendants, being duly ſworn, declares and ſays, that the facts contained in the above affidavit, are true, to the beſt of his knowledge and belief.

ANDREW BAYARD.

Before me,

JOHN INSKEEP, Alderman.

And that at a Supreme Court, held at Philadelphia, the 6th day of September, 1802, before the honorable Edward Shippen, Doctor of Laws, Chief Juſtice, and his aſſociates, Juſtices of the ſaid Court, on motion of Mr. M'Kean, and by conſent of Mr. Levy, the execution aforeſaid was ſet aſide, and on motion of Mr. Levy, a rule was obtained and entered for taking depoſitions in ſaid cauſe, in twenty-four hours notice, and the hearing of the argument was poſtponed till the enſuing term.—That on the 27th of October, 1802, a paper in the ſaid cauſe, whereof the following is a true copy, was filed in my office.

Levy S. Levy, 264. M'Kean.	*Thomas Passmore,* verſus *Andrew Pettit & Andrew Bayard.*	In the Supreme Court—amicable action caſe. To Sept. 1302. Aug. 6, 1802, judgment.

I do hereby acknowledge and declare, that the above action is for the uſe of John Travis, of the city of Philadelphia, merchant.

THOMAS PASSMORE.

Philadelphia, October 26, 1802.

(Witness) James Gibson.

And that on the 16th day of November, 1802, the depoſition of Edward V. Miller was filed, whereof the following is a true copy.

Thomas Passmore, Verſus *Andrew Pettit & Andrew Bayard.*	In the Supreme Court of Pennſylvania.

Edward V. Miller, being ſolemnly ſworn, doth depoſe and ſay, that he hath been clerk to Meſſrs. Pettit and Bayard, the defendants, ſince the month of July, in the year 1801, and is ſtill employed by them in that capacity; that, the deponent has been the only clerk in the counting-houſe of the ſaid defendants, ſince the month of December laſt—that he can ſay, upon his oath, that he is careful of, and attentive to the buſineſs of his ſaid employers, generally; that he cannot ſay, whether any letter from the plaintiff to ſaid defendants was delivered to him, at the counting-houſe of the latter, in the courſe of laſt ſummer, but doth poſitively declare, that he uniformly and ſteadily, places all letters put into his hands for the defendants at their counting-houſe, in one certain place—that is, on a deſk in the ſaid counting-houſe, at which the defendants write, and if any letter from the plaintiff to the ſaid Pettit and Bayard, was left with him laſt ſummer, at ſaid counting-houſe, he is confident

he muſt have placed it for their inſpection, in the uſual place, and further, ſaith not.

EDWARD V. MILLER.

Sworn this 16th November, 1802, before me,
EDWARD SHIPPEN.

I further certify, that the exceptions to the ſaid report, were ſet down for argument at December term, eighteen hundred and two, but that the argument thereof, was deferred till March term following, and that the foregoing contains a true ſtatement and copies of all the proceedings and papers in the action aforeſaid, up to, and including the twenty-eighth December, eighteen hundred and two, and that—

I will now, ſir, proceed to read another record, which alludes particularly to another ſuit, in a criminal caſe.

I, Edward Burd, Prothonotary of the Supreme Court of the ſtate of Pennſylvania, hereby certify, that at a Supreme Court held at Philadelphia, for the ſaid ſtate, the eighteenth day of September, eighteen hundred and two, before the honorable Edward Shippen, and his aſſociates, Juſtices of the ſaid Court, affidavits were filed, whereof the following are true copies :—

'The subscriber publicly declares, that Pettit and Bayard, of this city 'merchants, and quibbling underwriters, has basely kept from the subscri-'ber, for nine months, about five hundred dollars, and that Andrew Bayard, 'the partner of Andrew Pettit, did, on the third or fourth instant, go before 'John Inskeep, Esq. alderman, and swore to that which was not true, by 'which the said Pettit and Bayard are enabled to keep the subscriber out of 'his money for about three months longer; and the said Bayard has mean-'ly attempted to prevent others from paying the subscriber about two thou-'sand five hundred dollars—but in this mean dirty action, he was disappoint-'ed in: I therefore, do publicly declare, Andrew Bayard, a lier, a raschal, 'and a coward; and I do offer two and a half per cent. to any good per-'son or persons, to insure the solvency of Pettit and Bayard, for four months 'from this date.

'THOMAS PASSMORE.

'*Philadelphia, September 8th*, 1802.'

Thomas Passmore,
Verſus
Andrew Pettit & Andrew Bayard.
} Supreme Court, September term, 1802.

James Kitchen, of the city of Philadephia, innkeeper, being duly ſworn, declares, and ſays, that, on Wedneſday, the eighth day of September, inſtant, he ſaw Thomas Paſſmore, of the city of Philadelphia, whoſe name is ſubſcribed to the writing on the other ſide, place, and affix this paper to a board in the exchange room, in the city tavern, and that the ſaid Thomas

Paſſmore, in the preſence of the deponent, attached the ſame by wafers to the board in the ſaid room, in manner, as advertiſements are uſually poſted up.

JAS. KITCHEN.

Taken before me, this 17th day of Sept. 1802.
JOHN INSKEEP, Alderman.

Thomas Passmore,
Verſus
Andrew Pettit & Andrew Bayard.

Andrew Bayard, of the city of Philadelphia, merchant, being duly ſworn, depoſeth and ſaith, that the annexed paper, ſubſcribed with the name of Thomas Paſſmore, is in the proper hand writing of Thomas Paſſmore, of the city of Philadelphia; that the contents of the ſaid paper relate, as this deponent verily believes to a ſuit depending in this honorable Court, wherein the ſaid Thomas Paſſmore is plaintiff, and Andrew Pettit and this deponent are defendants; and this deponent further ſaith, that the affidavit taken before John Inſkeep, Eſq. alderman, in order to ſubſtantiate the exceptions to the report in the ſaid ſuit, is the oath taken by this deponent, to which the ſaid paper refers; and this deponent further ſaith, that he has no ſuit, controverſy, or diſpute with the ſaid Thomas Paſſmore, other than what ariſes from the ſaid ſuit depending in this Court.

ANDREW BAYARD.

Sworn in open Court, this 17th Sept. 1802.

EDWARD BURD, *Prot.*

That, thereupon, on motion of Mr. Dallas, a rule was granted by the court aforeſaid, that Thomas Paſſmore ſhould ſhew cauſe on the firſt day of December term, then next following, why an attachment ſhould not iſſue againſt him for a contempt; that afterwards at a Supreme Court, held at Philadelphia before the ſaid juſtices, on the eighth day of December, eighteen hundred and two, after argument of counſel, an attachment was awarded againſt the ſaid Thomas Paſſmore, that thereupon the ſaid Thomas Paſſmore, with Hugh Henry, as his ſurety, entered into a recognizance, before the ſaid Court, whereof the following is a true copy:—

Thomas Passmore, tent. reſpublica, in 300 dollars.
Hugh Henry, tent. reſpublica, in 300 dollars. } ON CONDITION,

That if Thomas Paſſmore, ſhall perſonally be and appear from day to day, during the continuance of this Court, to anſwer ſuch interrogatories as ſhall be exhibited againſt him; and alſo to abide the judgment of the Court in the charge exhibited againſt him, this recognizance to be void, otherwiſe of force, &c.

That during ſaid December term, to wit, on the thirteenth day of December, in the year laſt aforeſaid, interrogatories were filed, whereof the following is a true copy :—

These interrogatories, and the answers thereto, will be found in pages 15, 16, 17, 18, *and* 19—*of this book.*

And that at the ſame Court, held on the ſame day, Mr. Levy argued in behalf of the ſaid Thomas Paſſmore, Mr. Dallas argued in behalf of the commonwealth, and that afterwards, to wit, at a Supreme Court held at Philadelphia, on the twenty-eighth day of December, eighteen hundred and two, before all the juſtices of the ſaid Court, it was adjudged, that the ſaid Thomas Paſſmore ſhould be committed to the cuſtody of the ſheriff of Philadelphia county, in the debtor's apartment of the common jail of ſaid county, for the ſpace of thirty days, and pay a fine of fifty dollars to the commonwealth, and in the mean time that he ſhould be committed, &c.

(Seal) IN WITNESS WHEREOF, I, the ſaid Edward Burd, have hereunto ſet my hand, and affixed the ſeal of ſaid Supreme Court, at Philadelphia, this twenty-ſecond day of December, in the year of our Lord MDCCCIII.

EDWARD BURD, Prot.

I believe, with ſubmiſſion to the Court, that this is the only record teſtimony that we ſhall offer at this time, and having ſpoken to the gentlemen of the counſel, concerned for the reſpondents, it appears they are not quite prepared for proceeding with the teſtimony, and as it would be equally convenient for us to—

Mr. DALLAS. No, ſir,—we do not wiſh any delay on our account.

Mr. RODNEY. It ſeems then, that I have miſtaken the gentlemen. We ſhall proceed to examine the witneſſes, on the charges read in the article of impeachment. The Court will pleaſe to have Thomas Paſſmore called.

The oath was adminiſtered by Mr. Bryan, the clerk, to THOMAS PASSMORE.

He was requeſted by Mr. RODNEY, the counſel for the proſecution, to ſtate to the Court all that he recollected, relative to the action between himſelf, and Pettit and Bayard, ſome time between "the 18th of September, and December 1802."

Mr. PASSMORE's teſtimony was as follows :—

I received a notice, informing me that a motion had been made at the September term, for a rule to be granted to ſhew cauſe on the firſt day of the December term following, why an attachment ſhould not iſſue againſt me, for a contempt of Court. I accordingly attended: After being in Court ſome time, Mr. Shippen aſked, if Thomas Paſſmore was in Court. My counſel called me up to the bar. When I had come there, I was thus addreſſed by the Chief Juſtice: Sir, you have been guilty of an enormous libel againſt the characters of two gentlemen, Meſſrs. Pettit and Bayard, which requires great atonement, and ſaid, that the Court hoped you would prepare yourſelf to make thoſe gentlemen a handſome apology. After this declaration, I turned to my counſel, and told him, I thought it cruel I ſhould be condemned in open Court, without being firſt informed of what I had been guilty. My counſel then roſe and ſaid, he hoped that the Court would proceed in their uſual way, or words to that effect, by filing interrogatories, that we might know what the charges were againſt me. This mode was objected to by Mr. Dallas, and, I think, Mr. J. B. M'Kean, ſaying it was only neceſſary that I ſhould be aſked if I was the author of the publication put up at the coffee-houſe, and if I acknowledged that I was the author, I ſhould receive my puniſhment at once. The Court decided in favor of putting interrogatories. I was then bound over for my appearance from day to day, during the pleaſure of the Court, in the ſum of three hundred dollars, myſelf, and a ſecurity in a like ſum. I attended Court, in compliance with that recognizance. I was furniſhed with a copy of the interrogatories, and on the 27th of the ſame month, I filed my anſwers. There was then a general argument by Meſſrs. Dallas and Levy. During the argument of my counſel, he was frequently interrupted by the Court. He then ſaid, that he would ſay no more, and ſat down, appeared much hurt. I think nothing more took place this day. After the Court had adjourned, and after dinner, Mr. Levy aſked me to take a walk down to the lower part of the city with him. I reminded him of his interruption by the Court. He ſaid the Court had ſhewed a good deal of anger on the ſubject. I attended Court the next day, (the 28th.) After I had been there ſome time, the Chief Juſtice aſked if any thing had been done? I think Mr. Dallas anſwered 'no.' I underſtood this queſtion related to the apology to be made. The Chief Juſtice then called me up to the bar, and thus addreſſed me: "You have been obſtinate—the Court were in hopes that you would have made the apology required." That "the Court had delayed the buſineſs for that purpoſe, and if I had a done it, it would have meliorated, if not done away the neceſſity of paſſing the preſent ſentence, which they were about to do." This was, that I ſhould be committed to the county jail, for the ſpace of thirty

days, and pay a fine of fifty dollars, and pay the coſts of proſecution. After receiving this unexpected ſentence, I addreſſed the Court, and informed them that they had dwelt much upon my making an apology to Pettit and Bayard, that I believed that Mr. Bayard was the aggreſſor, and I the injured man; that I was willing to make any apology to the Court, as I was conſcious of never intentionally offending them. Judge Yeates then obſerved, that "my ſentence had been paſſed on me, and that they wanted to hear nothing further from me"—Judge Smith then ſaid "no—it would be only adding inſult to injury." Mr. Levy then applied to the Court for permiſſion, for me going home to ſee my family. I think he ſaid he would be reſponſible for the priſoner, if the Court complied with his requeſt. The Court complied, after making ſome obſervations, as to what would be the tendency in caſe I did not return. I then went home, with the unexpected and unpleaſant news to my family, who were already ſufficiently diſtreſſed by the death of a child, one or two days before. I then went to the priſon, where I continued for 30 days, paid the fine of 50 dollars, and paid the coſts of proſecution. I was then ſet at liberty.

CROSS EXAMINED.

Mr. Dallas. I wiſh Mr. Paſſmore to ſtate to the Court, who ſigned the agreement for an arbitration; whether it was ſigned by only four of the parties, or by all?

Mr. Passmore. There were two amicable actions.

D. I mean the agreement drawn up by Mr. Sampſon Levy?

P. They were both drawn up Mr. Sampſon Levy.

D. The witneſs appears not to underſtand me—I particularly mean the firſt amicable action?

P. The firſt agreement was ſigned by all the underwriters and myſelf.

D. I wiſh him to ſtate whether there was not a ſubſequent agreement?

P. There was.

D. I wiſh the witneſs to ſtate, whether it was ſigned by all the parties?

P. It was not.

D. Was it ſigned by Pettit and Bayard?

P. It was not.

D. I wiſh to know when the action was entered on the firſt agreement?

P. To the beſt of my recollection, the firſt was entered on the 12th or 13th of July; the ſecond, on the 17th or 18th.

I can ſtate, if the Court think it neceſſary, the reaſons for entering into the ſecond agreement.

D. Was there any material difference between the firſt and ſecond agreement. If there was, what was that difference?

P. Yes, there was a difference. One was drawn and ſigned by the different underwriters, who agreed to abide by the deciſion of the arbitrators, that ſhould be given in the amicable action between Pettit and Bayard, and myſelf. In that there was no ſpecial proviſion for the appointment of an umpire. The ſecond authorized the appointment of an umpire.

D. I wiſh the witneſs to be aſked, whether the ſecond agreement was ever preſented to Meſſrs. Pettit and Bayard for ſignature?

P. No; it was not intended to be.

D. I am to underſtand from this anſwer that it was never preſented to Meſſrs. Pettit and Bayard for ſignature. I wiſh the witneſs to ſtate whether it was ever ſigned ſubſequently by Meſſrs. Pettit and Bayard?

P. No; it was not. When I went with the firſt agreement to have it entered in the prothonotary's office, it was objected to, becauſe it had not the attorney's ſignature. Mr. Levy wrote a form of a rule of Court, and mentioned that the rule authorized the referees in caſe of diſagreement, to chooſe an umpire. He adviſed me to take out a new rule, ſo as to include all the underwriters, except Pettit and Bayard, as they were already included in the firſt.

D. Was the inſtrument given by Mr. Levy to be entered?

P. No, ſir.

D. Was the original agreement ever ſhewn to the referees?

P. I don't know that it was.

D. I wiſh the witneſs to be aſked whether it was ever ſhewn to Pettit and Bayard, by Mr. S. Levy, or any other perſon?

P. It certainly was, as will appear from the evidence of Mr. Sampſon Levy.

D. The witneſs will ſtate, whether the original agreement was ever produced to the referees?

P. I rather think it was not—but a copy of the rule of Court from the prothonotary's office was.

D. I wiſh to know from the witneſs, if, on his application to Mr. Moſes Levy for an execution, he was not told by that gentleman, that all the proceedings were null and void?

P. I did not apply to Mr. Moſes Levy until after the execution had been iſſued.

D. Did not ſuch a converſation between Mr. Moſes Levy and the witneſs, in which he declared the whole proceedings invalid, take place; and at what time did it take place?

P. Never to my knowledge; on the contrary he informed me that the exceptions filed by Mr. Bayard were out of time, and that the judgment had become abſolute.

D. I wiſh the witneſs to ſtate to whom he applied for an execution?

P. To Mr. Sampſon Levy.

D. Mr. Paſſmore has ſtated that an execution was taken out before he applied to Mr. Moſes Levy: I wiſh him to ſtate who iſſued it, and who was in the prothonotary's office when it was iſſued?

P. Mr. Burd and Mr. Ripley—on recollection, I ſaw Mr. Ripley the firſt time, and Mr. Burd and Mr. Ripley afterwards.

D. The witneſs will pleaſe to ſtate what Mr. Ripley ſaid to him, reſpecting the irregularity of the paper preſented for entry at the office of the prothonotary?

P. He ſaid that it wanted the name of an attorney to confeſs judgment.

D. No other reaſon?

P. None that I recollect.

D. I wiſh the witneſs to ſay, whether he was not informed, that upon a compariſon of the original agreement with the rule, there was a variance which would prove fatal to the whole proceeding?

P. He did not.

D. I wiſh the witneſs to be aſked whether he ever heard of ſuch a variance; and when?

P. If the Court pleaſes, I will relate the whole of the buſineſs. When I met Mr. Burd in his office, he told me, that it was abſolutely neceſſary for me to get an attorney to come and confeſs a judgment founded on the rule of Court, to abide by the award; and I went and got Mr. Brown, a young ſtudent of Mr. Sampſon Levy, who came and entered a confeſſion of judgment for me. There was then no difficulty.

D. May it pleaſe the Court, the witneſs appears not to underſtand me. I wiſh him to ſtate particularly, whether he had any intimation from any perſon of any variance between the agreement and rule of Court, that would deſtroy its effect.—If he had—at what time, and when?

P. After the judgment on the award of the referees had been entered, I went to Mr. Burd to take out an execution.

Mr. Ripley wiſhed me to wait till the next morning, as he ſaid Mr. Burd would then return from the country, where he then was with his family; and told me that a variance between the agreement and rule of Court had been diſcovered by young Mr. Burd, but that Mr. Bayard, in the preſence of young Mr. Burd, had ſaid, that Meſſrs. Pettit and Bayard would take no advantage of it.—So Mr. Ripley told me.

D. Will the witneſs undertake to ſay, that no other reaſons than thoſe he has mentioned, were aſſigned for objecting to the proceedings of the referees?

P. I can recollect no other reaſons than thoſe I have ſtated?

D. Did not Mr. Burd himſelf inform the witneſs of a variance between the rule of Court and the ſecond agreement?

P. Mr. Burd did not intimate any variance to me.

D. I wiſh the witneſs to ſtate, whether he was not informed by Mr. Burd, that Mr. Bayard would object to the award of the referees, on account of their having proceeded with an umpire?

P. I believe he did not; Mr. Bayard was the firſt to propoſe calling in a third perſon, or umpire.

D. I wiſh the witneſs to be aſked, whether he was preſent in Court during the time of the argument that took place, when the execution was ſet aſide; and at the time of the ſubſequent argument on ſetting aſide the judgment and report of the referees?

P. I was in Court when both arguments took place; but both were not done at one time. The motion for ſetting aſide the execution, was made on the 18th of September, I think by Mr. Joſeph B. M'Kean. Mr. Levy, without conſulting me, agreed to ſet the execution aſide. I caught him by the coat, and aſked him what he meant by it; he aſſured me it did not affect the judgment, though it did the execution.

D. I wiſh to know if a converſation did not take place between the witneſs and Mr. Burd, after entering the firſt agreement and before the ſecond was entered?

P. Yes there was.

D. Did not Mr. Burd mention the variance between the two agreements?

P. No; never intimated any variance to me between the agreements.

D. The witneſs will ſtate to the Court, whether the execution was not ſtayed in the prothonotary's office; and what Mr. Ripley ſaid to him at that time?

P. The execution was delayed by Mr. Burd; but Mr. Ripley said he should not object to issue an execution on the judgment filed on the award of the arbitrators.

D. I wish the witness to state whether a rule was not entered into between him and Pettit and Bayard for taking depositions?

P. So it appears by the record.

D. I ask the witness what use was intended to be made of the copy of the award and of the order drawn up in the office of Berrett and Shoemaker?

P. I had understood by Mr. Levy, that there would be a struggle, by Messrs. Pettit and Bayard, to bring it into Court again; and as it was then out of Court, I was eager to secure myself, as Messrs. Pettit and Bayard had endeavored to prevail on the other underwriters not to pay me.

D. I wish the witness to be asked whether he has at any time since, and when, assigned his interest in this claim to any other person?

P. Yes; I sold it to Young and Clements on the 9th of October 1802, for 500 dollars.

D. Was the assignment made in writing?

P. Yes.

D. Was it entered on the record?

P. I do not know whether it was or not.

D. I ask the witness what information he had, and from whom he received it, that Messrs. Pettit and Bayard had stimulated the other underwriters not to pay him?

P. I had been repeatedly told, by Mr. Lyle, that he would pay me if Pettit and Bayard would—and some time after he had paid me he told me he had seen Mr. Bayard, and that he had given him "a damned lecture" (to use his own expression) for doing so; there were many other reasons; when I presented the order to Mr. Jacob Shoemaker, the broker in this business, he was not able to pay me, and requested an indulgence of eight days, which I agreed to; the amount of my demand was near 5,000 dollars; Mr. Bayard's share was only 500 dollars, and Mr. Berrett, the partner of Mr. Shoemaker, at whose office the policy had been subscribed, said that Mr. Bayard had endeavored to prevail on the other underwriters not to pay me; when I told this to Jacob Shoemaker, he said I ought to post Bayard at the coffee-house.

D. To which of the underwriters did the witness apply for payment first?

P. I first applied to James Lyle.

D. Did you apply to Mr. Bayard, before you made this application to Mr. Lyle?

P. No.

D. Who did you apply to in the second instance?

P. To Messrs. Phillips, Crammond and Co.

D. Had you applied to Mr. Bayard before you made this application?

P. No.

D. To whom did you next apply?

P. To. Messrs. Nicklin and Griffith.

D. And you did not apply to Mr. Bayard before either of these underwriters?

P. No; I did not.——I am wrong. After I applied to James Lyle, I waited personally on Mr. Crammond; and on the 8th or 9th of August I met Mr. Bayard on the coffee-house steps and told him that the referees had decided against him; he told me that Mr. Berrett had informed him of the award, but said he did not know whether he would comply with it or not; that the arbitrators knew nothing of the principles of underwriting. I remember, very well, that I told him, I believed his principle of underwriting was to take the premium and never pay the loss——as Mr. Nicklin lived near me in the country I rode to his house and presented him with the award of the referees; after he had read it over, he told me it was just such as he had expected—some conversation then took place, in the course of which he said the case of the brig did not appear to be such as had been represented to him. I was paid by all the solvent underwriters.

D. I wish to know from the witness in whose hand writing the original agreement was drawn up?

P. Jacob Shoemaker drew the original agreement.

D. I wish the witness to state whether he did not attend the referees in the absence of Mr. Bayard?

P. Mr. Bayard attended the first meeting of the referees; I regularly attended. Mr. Bayard sometimes did not attend; he had only 500 dollars at stake, I had nearly 5000.

D. I wish the witness to state whether, at some of these meetings, he did not exhibit documents to the referees in the absence of Mr. Bayard which were not produced when he was present?

P. No, never: I once repeated some information that had been verbally given by the mate and cook of the brig; it re-

lated to an accident which ſhe met with in going down the river; the ſecond proteſt having been miſlaid, I related theſe circumſtances in preſence of Mr. Bayard, and afterwards committed them to writing, and made oath to their having been related to me by the mate and cook of the brig; but the referees would not receive them as evidence.

D. I wiſh the witneſs to recollect whether the affidavit of Mr. Phillips, the ſhipcarpenter, was not given when Mr. Bayard was abſent?

P. Yes; Mr. Phillips, who repaired the veſſel, attended the arbitrators once, and I believe, left the room before Mr. Bayard came in. After Phillips was gone, ſome of the referees laid a particular ſtreſs on his teſtimony, and Mr. Bayard obſerved that Phillips would ſwear to any thing and for any one —that he could get a ſhipcarpenter to ſay whatever he wiſhed.

D. Had he not, ſir, in his poſſeſſion two proteſts and did he preſent them both to the referees?

P. Yes, there was two proteſts.

D. Was not one of them miſſing for ſome time, and in whoſe poſſeſſion was it found?

P. I found one miſſing, and accuſed Mr. Bayard of having it in his poſſeſſion. He declared he had not. I afterwards found it among a ſecond parcel of papers in my own poſſeſſion, and delivered it to the arbitrators, as I conceived it contained ſome facts which operate ſtrongly in my favor.

D. I wiſh, if the witneſs has the two proteſts, he would lay them before the Senate?

P. I have not got them; all my papers were delivered up to the commiſſioners of bankruptcy.

D. Then I am to underſtand that thoſe proteſts are in the hands of the commiſſioners of bankruptcy.

P. I am not certain. The proteſts I believe were ſent to Briſtol to ſupport a claim of £800 for freight, but Mr. Clement Biddle, I ſuppoſe, has authentic copies.

D. I wiſh the witneſs to ſtate whether he ever gave Mr. Bayard notice of the choice of an umpire?

P. No.

D. What time elapſed between the appointment of an umpire and the ſubſequent meeting of the referees?

P. After the referees had choſen Mr. Ralſton as umpire, they adjourned for two or three days; and met accordingly. There were two perſons put in nomination for umpire; Mr. Pearce nominated Robert Ralſton, and Mr. Henry nominated Wm.

Haſlett; before this Mr. Pearce appeared rather diſpoſed to make an award in my favor, but he ſaid he had ſeen a new book, Marſhal on inſurance, and that he could not conſent to Mr. Henry's opinion; I was requeſted to call on Mr. Ralſton and notify him of his appointment, which I did, but he declined, as he ſaid he was going out of town with his family, being apprehenſive of the yellow-fever; Mr. Pearce ſaw him alſo. When the referees met it was propoſed to take up the other perſon nominated, which was agreed to; I waited on Mr. Haſlett, by their deſire, and he agreed to ſerve.

D. I ſtill wiſh an anſwer, as to what time expired between the nomination of Mr. Haſlett, and his meeting the referees?

P. I ſuppoſe not more than two hours; the referees had not gone away, when he came; he attended before they had adjourned.

D. Did he, when he went to notify Mr. Haſlett, leave the referees ſitting in their uſual place of meeting?

P. No; as the referees could not agree, they had not yet ſat; I left them walking in the room below; they had in one of the lower rooms agreed upon the umpire; when I came back, they were ſitting up ſtairs, in the room they uſually met in.

D. I think the witneſs ſaid it was three or four days between the appointment of the umpire, and the meeting of the referees with the umpire?

P. No, ſir; it was between the appointment of the two; that is, Mr. Ralſton and Mr. Haſlett.

D. What were the uſual periods of adjournment?

P. Two or three days.

D. Did the witneſs give Mr. Bayard any notice of the meeting after the appointment of the umpire?

P. No; It was not more my buſineſs than his; Mr. Pearce, I preſume, gave him notice.

D. The witneſs has ſaid that he was paid by all the ſolvent underwriters, except Meſſrs. Pettit and Bayard; I wiſh to know when he received that of Mr. James Yard.

P. Mr. Yard became inſolvent and it was never paid; but after Mr. Lyle and Mr. Cramond had paid me, I was allowed to prove the debt againſt Mr. Yard's eſtate.

D. How long after?

P. I cannot exactly ſay; but it was ſoon after the others had paid.

D. Does the witneſs recollect whether this was before or after filing the exceptions?

P. I cannot ſay.

D. I wiſh to know whether he proved his debt or only filed his claim?

P. The debt was proved in form, and no exceptions taken, that I know of, by Mr. Yard's aſſignees; Mr. Pearce, one of the referees, was an aſſignee of Mr. Yard, and though the debt was proved, I believe he eraſed it and entered it as a claim.

D. I wiſh to know if exception was not taken to it as a debt?

P. No, ſir; not until after it was proved and filed; it was afterwards eraſed as a debt.

D. Does the witneſs recollect the coſt of the repairs of the veſſel at Shelburne?

P. I cannot, the accounts were not received until after my bankruptcy.

D. I aſk the witneſs, if after the accounts were received, he communicated them to the broker or to the underwriters?

P. I believe not; it was not my buſineſs to make any communication, had I choſen, as I had abandoned the veſſel to the underwriters; a draft was drawn on me from Nova Scotia by the captain for 1600 dollars, and I handed that and all other accounts in my hands to the broker. The underwriters got Mr. Shoemaker, to draw up a ſtatement of the caſe, which was ſubmitted to Mr. William Rawle, for his opinion on their liability or not, and Mr. Rawle gave them an opinion that they were liable; they afterwards wiſhed to know whether I would accept of a re-transfer of the veſſel, and offered to make me a conſideration for taking her. The expence of repairs I have underſtood would amount to three thouſand and odd dollars.

D. Was not a notice ſerved on the witneſs appriſing him that a commiſſion would iſſue for taking teſtimony at Shelburne, in Nova Scotia, to enquire whether the veſſel was ſeaworthy or not?

P. Mr. Levy ſent to me to know if I would conſent to join in a commiſſion to Shelburne; but I declined having any thing to do with it, leſt it ſhould be made a pretence, to queſtion my abandonment and keep me longer out of my money.

D. Was not an application made to the witneſs, to join in a commiſſion for taking teſtimony at Shelburne, after the argument for ſetting aſide the execution?

P. I uniformly declined every application of this kind; I had made the abandonment, and I was apprehenſive they were ſeeking to hamper me; the application to which Mr. Dallas alluded to, I ſuppoſe was made in March 1803, at that time

I had no longer any intereſt in the tranſaction, as I had ſold my judgment to Mr. John Travis, and referred them to the veſſel for information, as ſhe had been then ſome time arrived at New-York.

D. I ſhall detain the Senate a few minutes on that part of the article of impeachment, which contains the paper the witneſs poſted up at the coffee-houſe. [Here Mr. Dallas read a part of the publication that Mr. Paſſmore had put up at the coffee-houſe.] I aſk the witneſs whether this charge of "ſwearing to that which was not true" refers to the ſuit then pending in the Supreme Court?

P. No, ſir; Mr. Moſes Levy had told me that the judgment I had obtained was in itſelf concluſive, and I certainly would not do a thing that might go to invalidate it.

D. I aſk the witneſs whether it was not in conſequence of the determination of Mr. Bayard to teſt that judgment in Court, that the witneſs charged him with keeping him out of his money three months longer?

P. It was entirely in conſequence of what Mr. Levy had told me, on the concluſiveneſs of my judgment.

P. The witneſs does not perfectly underſtand me; I wiſh to aſſiſt his recollection. Did not that judgment form a ſpecial part of the ſuit before the Court?

P. My alluſion was wholly to what Mr. Levy had told me; one letter of an attorney had already kept me three months out of my money, my counſel might be corrupted, and a ſecond letter might be written, which would keep me three months longer out of it.

D. I aſk the witneſs, if this aſſertion of ſwearing "to that which was not true," did not refer to the affidavit of Mr. Bayard, before Mr. Inſkeep?

P. It did.

D. The witneſs has ſaid ſomething about corruption, which I did not perfectly underſtand.

P. I thought that Mr. Bayard might poſſibly corrupt my counſel.

D. I aſk the witneſs, if he had any other controverſy with Mr. Bayard, beſide this action?

P. None, but what aroſe out of this ſuit.

D. Did not the diſpute ariſe out of this action?

P. I certainly alluded to the diſpute.

D. I aſk the witneſs, whether the publication he put up at the coffee-houſe, did not allude to the proceedings then before the Court?

P. I did not ſuppoſe the ſubject could be before Court; execution having been iſſued, and a levy made on Mr. Bayard's goods.

D. I wiſh the witneſs to ſtate explicitly, what he meant by the aſſertion, that it was intended to keep him out of his money three months longer?

P. I meant ſpecially, that as Mr. Lyle had ſaid repeatedly he would pay, if Mr. Bayard would, and Meſſrs. Lyle, Crammond and Nicklin had paid me; and as Mr. Bayard had endeavored to prevent them from paying me, that he would reſort to every artifice, to avoid paying himſelf.

D. I aſk the witneſs, whether the publication had reference to the underwriters, or to the Court?

P. I ſtated before, that he might, if I had iſſued another execution, and made a levy on his goods, prevail upon my lawyer, as he had done before, or upon ſome other lawyer, to write another letter, and ſtop the execution alſo.

D. I wiſh the witneſs to ſtate, whether this was not ſaid in reference to the power of the Court, or to the ſuit pending in Court, in December, between him and Mr. Bayard?

P. I never conſidered the ſuit as then pending in Court; or that it could be.

D. I aſk the witneſs if he was not preſent at the diſcuſſion of September term, when it was decided that the action was then pending?

P. I was only a few minutes there.

D. I wiſh the witneſs to ſtate, whether he was preſent in Court, when the argument for ſetting aſide the judgment of the referees was held, and if he was, to ſay upon what grounds that judgment was ſet aſide?

P. I was in Court at that time; I underſtand the ground upon which it was ſet aſide, was this: that Mr. Bayard wiſhed to delay the award of the referees, until the accounts could be procured from Shelburne; the referees thought this was unreaſonable, as I had abandoned to the underwriters, and the coſts of repairs, whatever they might be, could not operate on the principle of the award; the Court, however, ſaid Mr. Bayard's requeſt was a reaſonable one, and ſet the award aſide on that account alone.

D. I aſk the witneſs if that was the only reaſon for ſetting aſide the judgment and report of the referees?

P. I do not recollect to have heard of any other.

Mr. *Rodney.* I would aſk Mr. Paſſmore one or two queſtions, unleſs the Court wiſh to adjourn—Mr. Paſſmore, you have been

aſked if there was not a ſecond agreement under the rule of reference; I wiſh you to ſtate the reaſons for entering into that agreement?

P. As Mr. Bayard did not attend at the firſt meeting, I went in ſearch of him at the ſecond, and met him in the ſtreet, and told him the referees were met; I then went to the referees and told them Mr. Bayard was gone into the inſurance office; and a written notice was agreed to be ſent to each of the parties at the next time. When Mr. James Yard was aſked to ſubſcribe to the policy of inſurance, he ſaid that the brig was a damned old hulk, or ſomething of that kind, but he would ſubſcribe if I would give a premium of one half per cent more, than had been at firſt propoſed, and he would enſure notwithſtanding all the riſk; this, though I believed the veſſel to be ſound, I agreed to do, and Mr. Yard ſubſcribed for himſelf and all the other underwriters, except Pettit & Bayard; and becauſe Pettit & Bayard had only 500 dollars at riſk and I had nearly 5000 dollars depending, the referees ſuggeſted, as the nature of the inſurance was materially different, the propriety of taking out a new rule, to be ſubſcribed by all the underwriters, except Pettit & Bayard; to which all of the underwriters agreed, and Pettit & Bayard ſtood upon the original agreement.

Rodney. I aſk the witneſs whether, when he went to the prothonotary's office, he did not file the firſt reference in the office?

P. I did, ſir.

R. Was there a ſubſequent agreement entered into with Mr. Bayard which authorized the chooſing of an umpire; and if there was, whether the umpire met the referees and inveſtigated the claim in the preſence of Mr. Bayard?

P. Yes, Mr. Bayard was preſent; he came to the door of the room in which the referees were ſitting and appeared to be ſurprized that I was with the referees when he was not preſent; he ſaid I ought not to be there unleſs he was; I replied that it was as much his duty to be there as mine, and if he did not attend to his buſineſs it was not my fault.

R. Did Mr. Bayard attend at any of the previous or ſubſequent meetings?

P. Yes, I perfectly recollect his ſitting at the table with the referees and the umpire, and deſired to have ſome papers belonging to the caſe, which were given to him, and he then went into a general diſcuſſion of its merits with the umpire, and endeavored to convince him that he ought to decide in his favor.

R. I aſk the witneſs who was the firſt to propoſe the choice of an umpire; if Mr. Bayard did not, after he found the re-

ferees were of different opinions, ſay it would be better to call in the third perſon?

P. I recollect that Mr. Bayard was the firſt to propoſe an umpire when he found the two referees were of oppoſite opinions; I objected to the choice of an umpire then, and expreſſed a hope that the referees would agree without reſorting to that meaſure.

R. Had Mr. Bayard regular notice of the firſt meeting, and did he attend; and had he a full opportunity of ſupporting his pretenſions?

P. He attended at the time and place aſſigned and had as full an opportunity to maintain his caſe as I had myſelf.

Mr. Dallas. The queſtions put to the witneſs by the counſel for the proſecution, renders it neceſſary for me to aſk ſome other queſtions. I aſk the witneſs whether one of the referees did not live in his houſe during the whole of the tranſaction?

P. Yes, Mr. Henry lived in the ſame houſe with me.

D. Was he not your partner in trade?

P. No. He afterwards became my partner.

Adjourned 'till eleven o'clock to-morrow morning.

WEDNESDAY, Jan. 9, 1805.

Hugh Henry—ſworn.

Owing to an indiſpoſition, under which I labor at at preſent, owing to a very bad cold, I am apprehenſive I ſhall not be able to make myſelf heard by this honorable and auguſt tribunal.

Mr. Rodney. Pleaſe to ſtate to the Court, what you know on the ſubject of the reference between Pettit and Bayard, and Thomas Paſſmore, and afterwards what you know, relative to the proceedings of the Supreme Court, in which Mr. Paſſmore was concerned.

Mr. Henry. I would obſerve, ſir, that being one of the referees, if I am to give the proceedings in detail, I have to requeſt of this honorable body to recur to my notes, if my memory ſhould fail.

Mr. Rodney. I wiſh the witneſs, as to the principal points, to be as minute as poſſible, from memory, and not from his notes, unleſs afterwards he ſhall find them neceſſary.

Mr. Whitehill, *President of the Court.* "He may make uſe of his notes—the Court are agreed."

Mr. HENRY. I would obſerve, Mr. Speaker, my notes are lengthy. I may find them neceſſary to give the proper information to this honorable Court.

I recollect after being informed by Mr. Paſſmore, of his having taken the liberty, (as he expreſſed it) of having inſerted my name as an arbitrator, in an amicable ſuit in the Supreme Court, wherein he was plaintiff, and Pettit and Bayard defendants, on a policy of inſurance on the brig Minerva.—On his informing me of the circumſtance, I replied, I was ſorry he had thought of me as an arbitrator, it having been always diſagreeable to me, to be either a juror, or an arbitrator, ariſing from my diſlike to law ſuits, or any kind of litigation, when it could be avoided; after ſome further converſation with Mr. Paſſmore, from reaſons that he aſſigned to me, I agreed to ſerve, of which, I believe, from my own knowledge, that Mr. Bayard was informed of it, as alſo of the time of meeting of the referees: I draw this concluſion from Mr. Bayard's meeting us; at the time appointed, Mr. Pearce, the other referee, with Mr. Bayard, attended at the coffee-houſe. We went up ſtairs into one of the rooms, and ſat down; the rule of Court, I think was produced, authorizing us as arbitrators to proceed in the buſineſs; Mr. Paſſmore then produced his letter of abandonment to the underwriters, with a proteſt from the Captain of the Brig, the policy of inſurance, and ſeveral other papers—I can't particularize; after which he went into a ſtatement of his claims, urging the payment of them, and complained much that he had been ſo long kept out of his money.

Queſtion by Mr. RODNEY. Was Mr. Bayard preſent all this time?

H. Yes.

After which, Mr. Bayard replied, giving ſeveral reaſons why he had not paid, and concluded from the exiſting circumſtances, that he ought not to pay; after which, Mr. Pearce, the other arbitrator, went a conſiderable length of an examination of the ſtate of the caſe, as it appeared to him from the documents and reaſons that had been made—had been offered—to juſtify him in the opinion, that he then entertained of the ſtate of the buſineſs; after which, I followed him, and endeavored to ſhew from the information before us, what I conceived according to the beſt of my judgement, what the real ſtate of my opinion was in its preſent ſtage. I think it was at this meeting, that Mr. Paſſmore began to relate what he had been told by the mate and cook of the Brig, but we conceived the evidence to be inadmiſſible.

R. On what day did this happen?

H. About the 13th of July.

This, as I recollect, is all that paſſed at our firſt meeting. At our next meeting, which I think was in about three days after, we generally met on Wedneſdays, and I think on Saturdays, if my memory ſerves me—but will not be poſitive,

R. Was Mr. Bayard preſent, when you adjourned to the ſecond day?

H. I do not recollect that he went away—I think he was preſent at the adjournment.

At our ſecond meeting, as I have obſerved, we come to underſtand that Pettit and Bayard had ſigned the policy, under ſomewhat different impreſſions of the brig Minerva, though they had received the ſame premium as the other underwriters; the referees, therefore, thought there might be a probability of their finding in favor of the plaintiff, in one caſe, and not in the other; as we underſtood Pettit and Bayard were the oſtenſible perſons, and the deciſion in their caſe ſhould be obligatory on all the other underwriters; we thought it was too great a riſk for Mr. Paſſmore, he having ſeveral thouſand dollars depending on the award, and Pettit and Bayard only 500; we, therefore, told Mr. Paſſmore, it would be better to have another rule of Court made out, and to get all the other underwriters, except Pettit and Bayard, to ſign the rule, and to give them notice to attend, and alſo to notify the ſhip-carpenter, who had repaired the Brig, to attend at this meeting alſo; mention had been made alſo, by Mr. Paſſmore, I believe, of the pilot of the ſhip Margaret, being a neceſſary witneſs, which we alſo gave him orders to notify, to attend our next meeting; at this meeting, Mr. Paſſmore informed the referees, that Mr. Bayard was on the coffee-houſe ſteps, that he told him the referees were up ſtairs, but he did not attend.

R. Was Mr. Bayard preſent at the previous meeting?

H. Yes; he was preſent at the firſt, but not at the ſecond meeting. We now cloſed the meeting and adjourned.

Mr. STEELE. If I underſtand the witneſs rightly, he is now ſpeaking of the third meeting?

H. No, ſir, the ſecond; at our next meeting, which was the third—*(here the witness feeling himself fatigued, requested to be indulged with a seat, which was granted)*—the ſhip-carpenter, Mr. Phillips, attended and confirmed his written teſtimony, that we had before us; in the courſe of the converſation with Mr. Phillips, he made ſeveral obſervations in compariſon with her and ſeveral veſſels that he had repaired. As the ſea-worthineſs of the veſſel appeared to be the only objection made by Mr. Bayard and the other referee, to the validity of the policy, I was the more particular to have every information reſpecting the ſea-worthineſs of the veſſel; in conſequence of

which, I put this queſtion to the ſhip-carpenter—"were you "diſpoſed to take a voyage to any port in Europe, or would "you riſk yourſelf in her, (the Brig)?" His anſwer, to the beſt of my recollection was, "that he would not have any objection; that he would as ſoon go in her, as any veſſel in port." I think that was the reply. After which, Mr. Pearce obſerved, (the other referee) that from the teſtimony of Mr. Phillips, his opinion was much altered reſpecting the veſſel; for he had had very unfavorable impreſſions reſpecting her, and much prejudice againſt her, as a bad veſſel; that the policy of inſurance had been offered to him, and that he had refuſed to underwrite her under thoſe impreſſions. After the ſhip-carpenter went away, Mr. Bayard joined the referees, when we related to him what the ſhip-carpenter had ſaid—gave out in his teſtimony; when he replied, he did not think much of what Phillips ſaid, he would ſwear any thing; that we might get a ſhip-carpenter to ſwear to any veſſel—this was the expreſſion; after which, the referees went into a diſcuſſion of the matter: After which, Mr. Bayard obſerved, the referees not agreeing in opinion, that it would be beſt to chooſe a third perſon; accompanying it with this obſervation, "that Mr. Henry had already made up his mind on the ſubject," which I thought at the time it was made, it was highly improper, and I thought did not comport with that candor, that I expected in a gentleman; for I had not made up my mind finally at the time, and was determined I would not make it up, until we had got every information I conceived neceſſary for that purpoſe. I therefore replied to Mr. Bayard, "that I had not come there as the advocate of Thomas Paſſmore, I came there as a referee to arbitrate and ſettle the matters at variance betwixt him and Mr. Paſſmore, according to the beſt of my judgment, and which I was determined to do." Mr. Paſſmore then obſerved, "that he hoped there would be no occaſion to call in a third perſon; that it would appear much better, if the referees could ſettle the buſineſs themſelves, which he hoped they would do"—I think was the expreſſion. We came to no concluſion at this meeting; but I had reaſon to beleive Mr. Pearce's opinion was ſomewhat altered as to what he had ſaid reſpecting the ſea-worthineſs of the veſſel. We adjourned the meeting, and met, I think, in three or four days after. I have no dates, I cannot be particular.

Mr. Rodney. Was Mr. Bayard preſent when you adjourned?

H. According to the beſt of my recollection, we broke up together. At our next meeting the pilot of the ſhip Margaret came forward.—I will obſerve—I was about to obſerve that this was not in teſtimony, only hearſay; whether it is proper or not that I ſhould proceed to give——

R. Pleaſe to confine yourſelf as much as poſſible to the direct evidence.

H. I ſhall, ſir,

R. Did you chooſe an umpire on this ſuggeſtion of Mr. Bayard, either now or at any ſubſequent period?

H. Yes, ſir.

R. Who was that umpire?

H. We chooſe two, to explain which, if proper, I will go into particulars. Finding we could come to no concluſion ourſelves, agreeably to the powers we were entruſted with, we proceeded to the choice of an umpire; whether the propoſition was made by Mr. Pearce or myſelf, I do not recollect which, but it was agreed to; Mr. Pearce nominated Mr. Ralſton.

R. Was this at the fourth meeting?

H. At the fourth meeting I think—cannot be certain now; I nominated William Haſlett, both of which gentlemen we agreed were unexceptionable; but that we might be upon a perfect equality, we drew lots for choice. The choice fell on Mr. Ralſton. After which, I think, we adjourned, and told Mr. Paſſmore to inform the gentleman of what we had done; I think Mr. Bayard was not there when we adjourned—

R. To what time?

H. I think to the next Wedneſday—I think that meeting was on a Saturday—but I cannot be poſitive.

R. Did Mr. Ralſton attend?

H. No, ſir; when we found that Mr. Ralſton would not accept of the appointment and would not attend, I propoſed Mr. Haſlett, to which Mr. Pearce, the other referee, acceded —agreed.

R. Did he accept of the appointment?

H. Yes, ſir; when we had agreed on Mr. Haſlett, we deſired Mr. Paſſmore to go and inform him, who returned and informed the referees that he would attend to the buſineſs.

R. Did Mr. Bayard attend at the ſame meeting the umpire attended?

H. Yes, ſir.

R. Relate what paſſed?

H. After the umpire met the referees, we requeſted Mr. Paſſmore to read ſome papers relating to the buſineſs, for the information of the umpire; during which time Mr. Bayard came to the door of the chamber where we were ſitting, apparently as if he was looking for ſomebody.

R. Was it the room you uſually ſat in?

H. The ſame room, ſir. When he accoſted Mr. Paſſmore, and ſaid he thought it was very improper to be with the referees and reading papers in his abſence. We obſerved, that the papers Mr. Paſſmore was reading, was by order of the referees, and I think I obſerved to him myſelf, we had met by adjournment, and he ought to have been there, that I believed the referees wiſhed to do nothing but what was correct, and Mr. Paſſmore was reading the papers for the information of Mr. Haſlett; that was, I think, the obſervation I made. After which Mr. Bayard ſat down at the table and joined in the inveſtigation of the papers.

R. Did Mr. Bayard at any time particularly addreſs himſelf to Mr. Paſſmore?

H. The principal part of the converſation was between Mr. Bayard and Mr. Haſlett, on the nature of underwriting.

R. Did Mr. Bayard continue with the referees until the adjournment at this time?

H. Yes, ſir.

R. Did he, addreſſing himſelf to the referees wiſh them to poſtpone this buſineſs?

H. Yes, ſir, but not till we were juſt about to adjourn.

R. Did he ſtate any grounds for poſtponing?

H. Yes, ſir; he hoped the referees would not come to a deciſion, until Mr. Paſſmore furniſhed them with accounts of the diſburſements in repairing the brig Minerva, or until they could be obtained from Nova Scotia.

R. Did Mr. Paſſmore produce theſe accounts?

H. They were furniſhed, by Mr. Paſſmore, from Nova Scotia, where they were incurred.

R. Had Mr. Bayard at any time previous to this, called for thoſe papers?

H. Not that I recollect, ſir.

R. How long after this was it before you made your award?

H. I think that was on Wedneſday, and the next Saturday we made up the award.

R. Were there any objections on the part of the referees to the poſtponement?

H. I think it was obſerved, if my memory ſerves me, that we thought it was not Mr. Paſſmore's place to furniſh the papers; or ſomething to that effect.

R. Have you any knowledge of your own, of notice of this award being given to Pettit and Bayard?

H. No, ſir.

R. Were you preſent in Court when Mr. Paſſmore was cited to appear before the Court on the rule to ſhew cauſe why an attachment ſhould not iſſue for a ſuppoſed contempt?

H. Yes, ſir, in conſequence of the rule having been granted to ſhew cauſe.

R. Do you recollect what paſſed in Court?

H. I can't ſay that I recollect the whole—I recollect a part, ſir.

R. Do you recollect whether any of the Judges made obſervations to Mr. Paſſmore when he was called forward?

H. I recollect when Mr. Paſſmore was called forward that the Chief Juſtice accoſted Mr. Paſſmore in theſe words, I think, or words ſimilar, "You have been guilty of an enormous and groſs libel," I think was the expreſſion, "againſt the characters of two gentlemen, that requires very great atonement;" I think was the expreſſion if my memory ſerves me. The Chief Juſtice continued to ſay ſomething further, but in ſo low a tone of voice, that I could not hear it.

R. Were Judges Yeates and Smith on the bench?

H. Yes. ſir; I recollect them both.

R. Were you preſent in Court when ſentence was paſſed on Mr. Paſſmore?

H. No, ſir; I was preſent when he was called up to anſwer the interrogatories.

R. Did any thing fall from the Court at that time?

H. Yes, ſir, from ſome of the members of the Court there was.

R. From whom?

H. After the interrogatories were read and Mr. Paſſmore's anſwers, Mr. Dallas roſe, I think, and endeavored to ſhew that they were not ſufficient or competent to exculpate him from the contempt; and I think quoted ſeveral authorities in ſupport of that doctrine; to which Mr. Moſes Levy replied and quoted ſeveral authorities alſo in ſupport, I think, of the anſwers to the interrogatories being ſufficient, and I think particularly Judge Blackſtone's Commentaries in ſupport of it. In the courſe of the argument he was interrupted by Judge Yeates and Judge Smith; I think the gentlemen ſpoke at nearly one and the ſame time; Mr. Levy was ſtanding nearly behind me at this time and appeared extremely hurt and irritated; he obſerved, that if he was interrupted in this manner, and had not an opportunity of ſpeaking for his client, he would ſit down and ſay no more.

Mr. STEELE: As I think, ſir, it would tend much to the expediting of buſineſs, that the Court ſhould ſit in the afternoon, I therefore move that the Court adjourn 'till 3 o'clock in the afternoon. Which was agreed to.

SAME DAY, *P. M.*

R. Do you know of any thing that paſſed ſubſequent to what you ſaid this morning?

H. There was ſomething took place in the intermediate time, and alſo ſubſequent to what I related this morning.

R. Did it relate to Mr. Paſſmore's caſe?

H. I don't know that it particularly does; the firſt thing in order, not mentioned this morning, was my being in the Supreme Court at a time when a motion was made by J. B. M'Kean, Eſq. this I think was at September term 1802, to have the execution ſet aſide, that had been iſſued againſt Pettit & Bayard, and had been levied on the goods, as I underſtood, of Andrew Bayard, to which motion for ſetting aſide ſaid execution, Mr. M. Levy, counſel for Mr. Paſſmore, I underſtood, agreed to without any oppoſition.

R. I wiſh you to inform us, whether any thing fell from the Court at that time?

H. No, ſir; I don't think there was.

R. Can you recollect whether any thing fell from the Court, relative to Mr. Paſſmore, at any ſubſequent period?

H. No, ſir; but relative to ſetting aſide the award, and the reaſons for that—my knowledge goes no further.

Mr. BOILEAU. I wiſh to aſk the witneſs one queſtion: Mr. Henry has ſtated in his evidence, that when Mr. Paſſmore entered the Court, the Chief Juſtice accoſted him and ſaid, he had been guilty of an enormous and groſs libel on two gentlemen. The queſtion I wiſh to aſk him is, whether any converſation happened ſubſequently?

H. I do not recollect any converſation that took place afterwards. I only recollect, that Mr. Paſſmore turned to his counſel—but what he ſaid, I do not know.

B. I wiſh the witneſs to ſtate, whether he can recollect that Mr. Levy made any obſervations on the manner of proceeding?

H. I recollect, he did, ſir. I recollect, that Mr. Levy obſerved that he hoped the Court would proceed in the ordinary mode of proceeding in like caſes—I think was the expreſſion—that the Court would permit Mr. Paſſmore to anſwer by interrogatories.

Mr. RODNEY. Did any obſervations fall from the Court in reply to Mr. Levy?

H. I do not recollect that there was—there were ſome obſervations made by Mr. Dallas—I do not recollect any reply by the Court.

CROSS EXAMINED.

Mr. DALLAS. I underſtand the witneſs was one of the referees. I would wiſh Mr. Henry to ſtate, whether he ever ſaw the original agreement ſigned by Pettit and Bayard?

H. I never ſaw the original agreement ſigned by Pettit and Bayard—that I recollect. I ſaw the rule of Court authorizing the referees to meet, which I underſtood was a tranſcript of the agreement.

D. I wiſh the witneſs to ſtate, whether any of thoſe reaſons aſſigned by him in his teſtimony, for altering the mode of proceeding, were communicated by him, or any other perſon, to Meſſrs. Pettit and Bayard?

H. Whether the alteration in the mode of proceeding originated with Mr. Pearce or myſelf, I cannot ſay; but, we mutually agreed in the neceſſity of the thing; and, I have reaſon to believe, Mr. Bayard was made acquainted with the alteration, though I cannot poſitively ſay, that it was made formally to him—he met the referees once or twice afterwards.

D. I wiſh the witneſs to ſtate ſpecifically, his reaſons why he thinks Meſſrs. Pettit and Bayard had information of the alteration?

H. My reaſon is, that when it was firſt propoſed, Mr. Bayard, I think, ſaid he had not underwrote on the ſame impreſſions that Mr. Yard had of the ſame policy.

D. I would wiſh the witneſs to ſay, whether Mr. Bayard was preſent when the converſation took place between the referees?

H. I cannot poſitively recollect—but I think not. If my memory ſerves me, it appeared to be rather a wiſh, or propoſition from Mr. Bayard.

D. Then I underſtand the witneſs to ſay, that Mr. Bayard was not preſent all the time. I wiſh to know from the witneſs, whether the rule of Court, for entering into a new agreement, was ever ſhewn to Mr. Bayard, or to Pettit and Bayard?

H. I do not know that it was, I did not conceive, if my memory ſerves me, that that was neceſſary, he having a rule taken out for himſelf or for the houſe of Pettit and Bayard.

D. I wiſh the witneſs to ſtate, as he has mentioned the policy of inſurance produced at the meeting, whether James Yard ſubſcribed for any others than himſelf?

D. Yes, ſir, I think he did; but for how many beſide himſelf, I cannot recollect; but it was not leſs than two, if my memory ſerves me.

D. I aſk the witneſs whether Mr. Yard ſubſcribed for either of the underwriters, Meſſrs. Phillips, Crammond and Co. James Lyle, or Nicklin and Griffith?

H. I cannot deſignate particularly what gentleman he ſubſcribed for; but it is clear to me that he did ſubſcribe.

D. Did Mr. Yard ſubſcribe the policy for any more than himſelf; and, if he did, for whom did he ſubſcribe?

H. I cannot recollect particularly—my memory don't ſerve. I preſume, the policy might be produced, which would be beſt.

D. That is in the poſſeſſion of the counſel on the other ſide?

R. The gentleman is miſtaken—it is not in our poſſeſſion?

D. I wiſh the witneſs to ſtate, what documents were produced to the referees; I wiſh him to ſtate, whether any proteſt or proteſts, whether any ſurvey or ſurveys, were produced;

H. The principal papers that were exhibited to the referees, were the letter of abandonment, the policy, the proteſt of the captain, and I believe a ſurvey; that I think was all the principal papers, which were produced.

D. The witneſs will ſtate, whether at any time two proteſts were produced, and was not the laſt proteſt miſſing during part of the time?

H. Yes, ſir; in the inveſtigation of the buſineſs, the laſt proteſt that was forwarded, was miſſing. I recollect, that in the courſe of the buſineſs, Mr. Paſſmore thought Mr. Bayard was in poſſeſſion of the paper, as he had been looking at it. He mentioned it to Mr. Bayard, in the room, that he muſt have the paper; Mr. Bayard declared he had it not; but, at the laſt meeting of the referees, Mr. Paſſmore, in looking over his papers, found it.

D. I wiſh the witneſs to ſtate, whether he was preſent in the Supreme Court, during the time of the argument for ſetting the award aſide?

H. Yes, ſir, a part, I cannot ſay all the time.

D. I aſk the witneſs, whether the counſel of Mr. Bayard did not move for having the award ſet aſide, in conſequence of the ſecond proteſt not being produced, which would have proved the veſſel not to be ſea-worthy.

H. I do not recollect that that was an argument made uſe of. With reſpect to the particular argument, I cannot change my memory with it. I recollect that I was in Court when the

Judge gave the opinion of the Court, and if my memory ſerves, that the reaſon for ſetting aſide the award was, that Pettit and Bayard had not been furniſhed with notice of the laſt meeting of the referees.

D. I wiſh the witneſs to ſay, whether any notice was given to Mr. Bayard perſonally or in writing, ſubſequently to the firſt meeting?

H. I do not recollect, it is impoſſible I ſhould, unleſs I ſerved the notice myſelf, which I did not.

D. I wiſh to know whether on the breaking up of the firſt meeting, the day, hour and place of the next meeting were fixed on?

H. Yes, ſir; our adjournments were to a certain day, with reſpect to the hour it was generally before what is called coffee-houſe hours; the place was always the coffee-houſe. I here beg leave to anſwer to a previous queſtion, as to the reaſons given for ſetting aſide the award; I was preſent—not preſent the whole time; but I was, when the Judge gave the deciſion; the reaſon aſſigned by the Court was, that the requeſt made by Meſſrs. Pettit and Bayard, for the poſtponement of a deciſion, until they could procure the accounts from Nova Scotia, was a reaſonable requeſt.

D. The witneſs will ſtate, whether Mr. Bayard had, from him, or any other perſon, notice of the appointment of Mr. Haſlett as an umpire, before he ſaw him in the room?

H. He had it not from me.

D. What time elapſed between Mr. Haſlett's appointment, and his attendance to the buſineſs?

H. Perhaps, ſir, about one hour from the time of the appointment, until Mr. Haſlett come.

D. Whether after they had agreed on the nomination of Mr. Haſlett, the referees did not leave the room in which they were previouſly ſitting, to go into the coffee-room?

H. If my memory ſerves me, ſir, we had not gone up to the room; we were below, and were informed that Mr. Ralſton would not attend.

D. I aſk the witneſs, whether from what he has laſt ſaid, he means the room on the right hand?

H. Yes, ſir; in the room on the right hand, if my memory ſerves me.

D. Whether this nomination in the coffee-room was previous to going up into the room where they uſually ſat?

H. Yes, ſir, it was previous to our going up.

D. I wiſh the witneſs to ſtate, whether they went up into the room in which they uſually ſat, before or after Mr. Haſlett joined them?

H. If my memory ſerves me, we did not go up to the room where we commonly met, until Mr. Paſſmore returned, and told us that Mr. Haſlett had agreed to ſerve; we then went up before Mr. Haſlett arrived.

D. I wiſh the witneſs to ſtate, whether the meeting of that evening did, or did not, depend upon Mr. Haſlettt's accepting his appointment as an umpire?

H. In the firſt place, I would obſerve, it was not in the evening; it was about coffee-houſe hours; about 12 o'clock. Before I went to the coffee-houſe, I did not know but Mr. Raſſton would ſerve. We knew of no other way than if Mr. Haſlett had not accepted, we muſt have adjourned.

D. I aſk the witneſs, whether Meſſrs. Pettit and Bayard, or either of them, had notice of Mr. Haſlett's appointment as an umpire?

H. I thought, ſir, I anſwered that queſtion before. I have no knowledge, except what Mr. Paſſmore ſaid. But with reſpect to Meſſrs. Pettit and Bayard, I do not know that they were made acquainted with it.

D. I wiſh to know from the witneſs, whether Mr. Bayard was preſent at any part of the examination of Phillips, the ſhipcarpenter, and whether any opportunity was given him to examine him?

H. I obſerved in the former part of my teſtimony, I think, that Mr. Bayard did not come, until Mr. Phillips went away. I believe he was only once there.

D. I wiſh the witneſs to ſay whether Mr. Bayard ever had an opportunity to examine the pilot?

H. With reſpect to the pilot is not in teſtimony before you.

D. I beg to be underſtood—all I mean is, had Mr. Bayard any opportunity to examine the pilot?

H. I believe I obſerved in what I ſaid upon that ſubject, that Mr. Pearce did not come till after the pilot had gone away.

D. I aſk the witneſs whether Mr. Bayard did, or did not appear much ſurprized after he had entered the room to find the umpire there and Mr. Paſſmore reading papers to them?

H. I have mentioned in the former part of my teſtimony that Mr. Bayard came to the door apparently as looking for ſomebody; whether he was ſurprized or not I cannot ſay.

D. I wiſh the witneſs to ſtate whether he did not obſerve himſelf to Mr. Bayard, when he was about to retreat from the room, and called to him telling him, "come in Mr. Bayard we are on your buſineſs?

H. I recollect Mr. Bayard's coming to the door, whether it was ſhut or not I cannot ſay; but I think it was upon a jar. If my memory ſerves me. If my memory ſerves me, I was ſitting with my ſide to the door, looked round and ſaw it was Mr. Bayard; as I obſerved before he ſeemed to be looking for ſomebody; I think I ſpoke to him and aſked him to come in. I do not recollect that he appeared to wiſh to retreat, if my memory ſerves me.

D. I aſk the witneſs whether he had been examined before on this queſtion in the Supreme Court?

H. I might have, ſir.

D. I aſk the witneſs whether he can recollect that it was ever ſuggeſted that Mr. Bayard agreed to the choice of the umpire?

H. I do not recollect, ſir, that I did, in any other way than by inference, in his ſitting down on the buſineſs; for, as I ſaid before, I did not know that he had ever been conſulted, as to that buſineſs.

D. Whether, at any time, and at what time, he heard of the difference between the agreement and the rule of Court, for the arbitration?

H. I don't recollect, ſir.

D. It appears, Mr. Speaker, that the agreement was to ſubmit the matter in diſpute to Mr. Pearce and Mr. Henry, and they were to decide; upon carrying the agreement to the prothonotary's office, the rule was iſſued giving a power to chooſe an umpire, and the rule was iſſued with this error; I wiſh to know at what time the witneſs was informed of the variance between the agreement entered into and the rule that iſſued to the referees?

H. I think, ſir, I never heard of the rule of Court being taken out 'till Mr. Paſſmore informed me he had taken the liberty to make uſe of my name as an arbitrator.

D. I aſk the witneſs, whether he ever heard of the difference between the agreement and the rule of Court?

H. I never, ſir, at any time, while I was acting as a referee under the rule of Court iſſued for that purpoſe, underſtood it in any other way,—(that rule under which we acted)—than that if we did not agree, we were authorized to chooſe an umpire; I never heard that there was none [no authority] until after the execution was ſet aſide; but certainly not 'till after the award was entered in the office.

D. I wiſh the witneſs to ſtate, whether Thomas Paſſmore informed him he had ever applied at the prothonotary's office for an execution, and was refuſed; if ſo, at what time was the application made?

H. If my memory ſerves me, I think Mr. Paſſmore mentioned to me, that an execution had been granted, but I never did —never heard him ſay that any objections had been made by the prothonotary, to granting the execution.

D. I will now transfer the attention of the Court to the criminal part of the proſecution. I wiſh the witneſs to ſtate, whether he is poſitive or correct, that the fact of the contempt was proved or acknowledged before the Court, before he heard the Chief Juſtice call for Paſſmore, and deſcribe the enormity of the libel, and ſay that it required great atonement?

H. I do not recollect, ſir, that any thing had come to my knowledge, that could make me have an idea that the contempt could be proved. With reſpect to the order of time, I think the firſt time I was in the Supreme Court, was the day on which the rule was applied for to ſhew cauſe; I was not in the Court again, until the day on which Mr. Paſſmore was called up.

D. I aſk the witneſs, in what part of the Court he was when Paſſmore was called up; whether within the bar, or without?

H. I cannot ſay, ſir, particularly what part of the Court I had been in; but I recollect well another time attending the Court, as the ſecurity of Mr. Paſſmore; I was then within the bar.

D. I wiſh the witneſs to ſtate, whether his memory will enable him to recollect what fell from me while I was addreſſing the Court, in behalf of the attachment; if I did not ſay, when Mr. Moſes Levy wiſhed interrogotories to be filed, that having proved the contempt, it was a matter of privilege, and not our duty to exhibit them?

H. I recollect after Mr. Paſſmore had been called up, and received his reprimand, Mr. Moſes Levy, his counſel, hoped Mr. Paſſmore would find an opportunity of exculpating himſelf in the uſual way, and made ſome other obſervations, to which Mr. Dallas ſaid, that that was not neceſſary, all that Mr. Paſſmore had to do, was to own the hand writing, and if ſo, the Court might proceed to paſs ſentence.

D. The witneſs is perfectly correct; I aſk him whether he can recollect ſtill further, that I ſtated that Paſſmore had acknowledged the fact charged?

H. I do not recollect that it appeared in Court, that Mr. Paſſmore ever acknowledged having been guilty of a contempt?

D. I wiſh the witneſs to ſtate, whether Mr. Paſſmore, by himſelf, or by his counſel, had not acknowledged the poſting up and ſigning the paper?

H. It is very poſſible; I really cannot charge my memory whether he did, or did not. He might have acknowledged that he ſigned it.

D. I aſk the witneſs, whether he heard Mr. Moſes Levy ſay, "if he was not permitted to be heard in favor of his client, he would ſit down and ſay no more?

H. The ſpeaker will obſerve, that the anſwer to this queſtion will apply to another time, not to the time that I was in Court, when Mr. Paſſmore was called up to anſwer to the interrogatories. After the interrogatories had been gone through with, and the anſwers of Mr. Paſſmore, Mr. Moſes Levy roſe and addreſſed the Court, as I think I have obſerved in a former part of my teſtimony; Mr. Levy was interrupted, and appeared hurt and chagrined, and ſaid that if he had not liberty to ſpeak for his client, he would ſit down.

D. I aſk the witneſs whether, in the courſe of the argument, Mr. Levy had not ſuffered frequent interruptions from the oppoſing counſel?

H. Yes, ſir, he did; and I think the oppoſite counſel quoted ſeveral authorities, to ſhew that his arguments did not apply to the queſtion; after which, Mr. Paſſmore's counſel quoted ſeveral authorities, to ſhew that the anſwers were ſufficient to purge the contempt—and, I think, in particular, Judge Blackſtone.

D. I now put it to the candor of the witneſs to ſay whether the manner of the Court, in interrupting Mr. Levy was rude, angry or improper?

H. This is a queſtion, Mr. Speaker, of mere matter of opinion, which I am ſorry I have to anſwer; but as truth is neceſſary in all things I muſt ſay, that the interruptions appeared very rude. The gentlemen ſeemed to ſpeak at one and the ſame time, and ſeemed agitated and diſpleaſed.

Mr. Boilbau. Mr. Henry has ſtated that Mr. Levy was frequently interrupted in the courſe of his argument; I wiſh him to ſtate whether thoſe interruptions proceeded from all or only one of the gentlemen of the bench; or whether they proceeded from the bar?

H. I only allude to Judge Yeates and Judge Smith; I do not recollect of Judge Shippen.

B. I aſk the witneſs whether ſince that time he has ever heard Mr. Moſes Levy complain of the rudeneſs of the interruption?

H. No, ſir, I never have; I never had an opportunity of talking with Mr. Levy on the ſubject.

D. I wiſh to aſk the witneſs whether he does not recollect the Court aſſigned a variety of reaſons beſide that one of Mr. Bayard's not having been furniſhed with accounts of the repairs, as the reaſon for ſetting the award aſide?

H. To the firſt part of the queſtion I anſwer, the Judges did not complain that Mr. Bayard had not time to procure the accounts, but he aſſigned it as a reaſon that he had not been furniſhed with the papers. With reſpect to the obſervations made by the Court, the judge made ſeveral and was pleaſed to ſay that the gentlemen to whom the buſineſs had been referred, were gentlemen of underſtanding and information.

D. I aſk the witneſs whether the teſtimony of Phillips, the ſhipcarpenter, did not prove that all the repairs were made on the upper works of the veſſel?

H. No, ſir, I do not recollect that to have been the caſe, but I recollect the Chief Juſtice addreſſing himſelf to me, and aſked me the reaſons for paſſing my judgment, for I told him the teſtimony of the ſhipcarpenter proved that the veſſel was ſea-worthy. After that the Judges expreſſed their ſentiments in favor of my judgment.

D. I wiſh the witneſs to ſtate whether Phillips did not make an affidavit of the facts?

H. Yes, ſir, it was ſworn to before Clement Biddle, I think.

Mr. RODNEY. I will aſk the witneſs one or two queſtions more. Whether the referees proceeded on the grounds of Phillips's affidavit or on his teſtimony?

H. I did not look upon the examination taken before the referees to be any thing more than a corroboration of what he had previouſly given on oath.

R. Was his examination the ſame with his affidavit?

H. Much the ſame.

R. I think the witneſs ſaid before, that when examining Mr. Phillips, he had mentioned ſomething to him about a voyage to Europe; I would wiſh him to repeat that part?

H. As to the queſtion I aſked Mr. Phillips, as to whether if he was inclined to go to any diſtant port in Europe, whether he would have gone in that veſſel; he anſwered that he would as ſoon as in any other veſſel in port.

R. I think the witneſs has ſtated that Mr. Bayard was not preſent at the examination of Phillips; I aſk the witneſs whether Mr. Bayard, if he had thought proper to attend, might

have had a full and fair opportunity of examining him himſelf; and whether he might have attended, if he had thought proper?

H. Yes.

R. Mr. Henry, you have been aſked by the oppoſite counſels what you would have done if Mr. Haſlett had not attended; I aſk you whether, if Mr. Haſlett had not come, the referees, would have adjourned to meet again?

H. Certainly, ſir.

R. I aſk the witneſs whether Mr. Bayard was preſent at the time of adjournment of the previous meeting?

H. I do not recollect, ſir; I think he was not.

R. Was he preſent at the meeting previous to that?

H. If my memory ſerves me, I believe he was; we had five meetings, three of which I am confident he was at.

R. The witneſs has ſaid that the pilot gave a ſtatement in writing; I aſk him, did not the referees reject the pilot's ſtatement?

H. I really do not know.

R. Did they receive it as teſtimony?

H. No, ſir; not as teſtimony; it was conſidered as a mere account of what had taken place in the river.

R. Mr. Rodney. We ſhall next proceed to the examination of William Haſlett.

William Haslett—ſworn.

Mr. Rodney. I wiſh the witneſs to relate to the Court all the facts he knows that relate to the ſubject now before them.

Mr. Haslett. My firſt meeting, ſir, with Mr. Henry and Mr. Pearce was at the coffee-houſe, about the latter end of July 1802. I found them together with Mr. Paſſmore ſitting in a room of the coffee-houſe, up ſtairs; I ſat down with them, and they proceeded to give me a ſtatement of the caſe ſubmitted to them; Mr. Bayard was not preſent, nor did I know at what hour the parties intereſted were to meet the referees; not long after I had taken my ſeat at the table Mr. Bayard came to the room door and expreſſed a degree of ſurprize at finding Mr. Paſſmore with the referees without his knowledge. Mr. Bayard then came into the room and ſat down with us, at the table, and we entered upon the buſineſs immediately; all the teſtimony, I believe, that had been exhibited to the arbitrators was laid before me, I found Mr. Henry and Mr. Pearce were of different opinions, and that the queſtions, at leaſt the principal queſtions, in diſpute were, whether the veſſel was ſea-

worthy at the time of her ſailing and whether Mr. Paſſmore had exhibited all the documents that were neceſſary and proper; after hearing what Mr. Paſſmore and Mr. Bayard had to ſay, and Mr. Henry and Mr. Pearce having each expreſſed their opinions relative to the buſineſs, I requeſted time to deliberate upon the ſubject, finding it depended altogether on my opinion; and we agreed to adjourn to a future day; before the next meeting I was enabled to make up my mind with reſpect to the opinion that I was to give; I communicated this to Mr. Henry and Mr. Pearce, informing them at the ſame time, that I was ready to ſign an award in favor of the plaintiff; Mr. Pearce declined to ſign the award with us; at the next meeting Mr. Pearce was not preſent, then Mr. Henry and myſelf drew up an award and ſigned it; I do not recollect any thing further, ſir, relative to the buſineſs before the Court; if queſtions are propoſed I will endeavor to anſwer them.

R. I aſk the witneſs whether Mr. Bayard by his acts and conduct before the referees did not manifeſt a knowledge that Mr. Haſlett was acting as umpire?

H. Mr. Bayard, to the beſt of my recollection, when he entered the room, affected not to have any previous knowledge of the meeting; he ſat down with us however at the table and entered into a diſcuſſion of the merits of the caſe generally.

R. I wiſh the witneſs to ſtate whether at any time previous to the diſcuſſion Mr. Bayard ſtated any caſes as applicable to the caſe before you?

H. Yes, ſir; Mr. Pearce quoted from Park on inſurance, two or three caſes, which he thought were ſimilar to the caſe we had before us, and Mr. Bayard joined with Mr. Pearce in opinion that they were ſimilar.

R. I aſk the witneſs, whether he did not ſtate ſome caſes to Mr. Bayard alſo?

H. I do not recollect whether it was directed to Mr. Bayard or Mr. Pearce; and to the beſt of my recollection, I ſpoke to them in turn.

R. The witneſs will ſtate to the Court, whether Mr. Bayard went into an argument of the merits of the caſe?

H. Yes, ſir; to the beſt of my recollection, Mr. Bayard brought forward his objections to Mr. Paſſmore's claim, and gave the reaſons upon which they were founded.

R. I aſk the witneſs whether Mr. Bayard was preſent himſelf and the two referees during the whole time of this meeting, and whether he was not notified of the ſubſequent meeting?

H. As far as my recollection ſerves me at this diſtant period, Mr. Bayard did not ſtay with us all the time, and was not

preſent at the adjournment. He requeſted when he left the room, that the referees would not decide until all the papers from Shelburne were brought forward.

R. Did the referees give any anſwer to that requeſt at that time?

H. Not to the beſt of my recollection.

R. Did Mr. Bayard leave the room of his own accord?

H. Yes, ſir.

R. The witneſs will ſtate to the Court whether Mr. Paſſmore attended the laſt meeting when they made out the award?

H. I think he was preſent, as far as my recollection ſerves me, he was.

R. Had Mr. Bayard complained to the referees, that he had not as fair a chance as Mr. Paſſmore, of knowing the meeting?

H. Mr. Pearce, who was choſen by Mr. Bayard, was preſent; and, I think it probable, he would give notice.

R. If Mr. Bayard had remained in the room, would he not have had as fair an opportunity of knowing the next meeting, as Mr. Paſſmore?

H. Yes, ſir, any perſon in the room would have known when and where the meeting was to be.

R. I wiſh the witneſs to ſtate, whether he was preſent in the Supreme Court, when Mr. Paſſmore was cited to appear before the Court, on an attachment for a contempt; if he was, I wiſh him to relate was paſſed there?

H. I was not in Court, nor do I know any thing of what happened in Court. I was examined in Court, relative to the exceptions; but have no knowledge relative to the other part of the buſineſs of Mr. Paſſmore with the Court.

CROSS EXAMINED.

Mr. DALLAS. The witneſs will ſtate, who apprized him of his being nominated an umpire, where he was, when he received the notice, and how ſoon after he attended the meeting of the arbitrators?

H. Mr. Paſſmore called upon me at my counting-houſe, and informed me that I had been nominated umpire, and requeſted me to meet the arbitrators ſome time about 12 o'clock—in a very ſhort time from the time, when Mr. Paſſmore left me, I met the arbitrators.

D. Can the witneſs aſcertain the time; was it half an hour, or more.

H. I cannot recollect, ſir, preciſely the time ; I rather am inclined to believe that it was not more than an hour at fartheſt.

D. I aſk the witneſs, whether upon his joining the referees, any rule or rules of Court were ſhewn to him ?

H. I am not able to recollect, ſir, particularly whether I read the rule of Court ; but the impreſſion on my mind is, that it was among the papers.

D. Whether there was one or two rules ?

H. I really cannot recollect, ſir, whether there was one or more.

D. Was there any documents, and what were the documents read by Mr. Paſſmore, or peruſed by himſelf at that, or any other meeting ?

H. Yes, ſir ; I recollect there was the policy of inſurance, the captain's proteſt, the ſurvey held on the veſſel at Shelburne, the teſtimony of Mr. Phillips, with his qualification, a paper on which was written a ſtatement of the pilot on board the veſſel which run foul of the brig, and which was ſuppoſed to have been loſt, the letter of abandonment, and Mr. Paſſmore's relinquiſhment to the underwriters.

D. I wiſh Mr. Haſlett to ſtate, whether he ever had an opportunity to examine Mr. Phillips himſelf ?

H. Mr. Phillips, I think, to the beſt of my recollection, was in the room when I firſt entered it.

D. I wiſh the witneſs to ſay, whether he examined Phillips ?

H. I heard Mr. Phillips ſay all that he had to ſay—which I recollect was, that he had given her all the repairs neceſſary to proceed on her intended voyage.

D. Does the witneſs recollect, whether the referees told him they had examined Phillips before ?

H. I really cannot recollect, ſir, whether they informed me or not.

D. May it pleaſe the Court, Mr. Henry has ſtated that Phillips was examined before the appointment of the umpire ; perhaps Mr. Haſlett will be able to ſay, whether Mr. Phillips was in the room or not, when he came in ?

H. I think, ſir, I am clear in my recollection, that Mr. Phillips was in the room when I entered ; and, altho' I believe Mr. Phillip's teſtimony was in writing, I do not recollect that he added any thing to it.

D. Mr. Haſlett, you have mentioned that the ſtatement of the pilot was communicated to you by the referees ; did you ever examine the pilot yourſelf ?

H. No, ſir; I never ſaw the pilot; I never conſidered it as teſtimony; a ſtatement in writing, not given on oath, was not entitled to conſideration.

D. Did you ſee an affidavit made by Thomas Paſſmore, among the papers handed to you for your inſpection?

H. I think there was a paper of that deſcription, but I really have not a clear recollection of what ſubſtance it was.

D. Did Mr. Bayard ever ſee it?

H. It was on the table amongſt the other papers, when Mr. Bayard was in the room; but I do not know whether he ſaw it or not.

H. Was it among the papers Mr. Paſſmore was reading to the referees, when Mr. Bayard came into the room?

H. I believe it was, ſir.

D. I wiſh Mr. Haſlett to ſtate, whether before Mr. Bayard came into the room, and while Mr. Paſſmore was there, he did not receive a ſtatement of the caſe?

H. I cannot recollect, ſir, perfectly what happened between the time I entered the room, and the time that Mr. Bayard came in. I recollect when Mr. Bayard came, they had proceeded, but whether upon the merits of the caſe, I cannot ſay.

D. I wiſh the witneſs to ſtate, whether he has been examined on this queſtion before?

H. I was examined before the Court in Philadelphia, and muſt confeſs, that my recollection, with reſpect to many things, may be incorrect. I had not the leaſt thought of being called as a witneſs in this caſe.

D. I aſk Mr. Haſlett, whether he did not, in making up his mind on the facts, reſt upon the ſtatement of the other referees?

H. No, ſir; I think I am perfectly clear in ſtating that I was ſo impreſſed with the importance of my ſituation; and that as the whole reſted on me, I was more particular in reading books on inſurance; I had Parke, and called upon Mr. Biddle, and alſo called on Mr. Shoemaker for their opinions; and it was ſome days before our next meeting that I was determined in my opinion.

D. I wiſh the witneſs to ſtate whether each of the parties went into a diſcuſſion of their reſpective claims?

H. Yes, ſir; I believe that was the caſe.

D. Whether or not he was examined on the ſubject ſince his examination before the Supreme Court?

H. My laſt examination was laſt winter before the honorable the Houſe of Repreſentatives.

D. When were you laſt examined in a Court upon the ſubject?

H. I really cannot recollect the time.

D. I aſk the witneſs whether between his examination in March 1803 and the preſent time, he had any conference with the other referees?

H. I do not recollect any thing on the ſubject.

D. Whether he had any converſation with any other perſon on the ſubject?

H. I cannot recollect that I had any conference on the ſubject.

Adjourned 'till 10 o'clock to-morrow, A. M.

THURSDAY, January 10th, 1805.

Mr. RODNEY. Mr. Speaker, I underſtood the witneſs who was examined laſt on yeſterday, having refreſhed his memory, by a reference to notes which have been ſhewn to him, wiſhes to explain; I wiſh him to be called forward.

Mr. HASLETT. I would beg leave to ſtate, ſir, that when I appeared before the Court yeſterday, I did not think it neceſſary to give a full ſtatement, as to the motives of my deciſion, on the reference; but, on reflecting on the queſtion put to me by Mr. Dallas, whether as an umpire, I did not make up my mind, from the ſtatement of the referees, and as I have aſſiſted my recollection by a reference to ſome notes, I wiſh to ſtate more ſpecifically. If Mr. Dallas will pleaſe to repeat the queſtion, I will endeavor to anſwer it.

Mr. DALLAS. I wiſh him to ſtate, whether as an umpire, he made up his mind from the papers ſubmitted to him, or the ſtatements of the referees?

H. I beg leave to ſtate, that I did not at the time deem it neceſſary to receive a ſtatement from the parties, or from the referees. For the information of Meſſrs. Henry and Pearce, I wrote a letter to them, apprizing them of my determination: If the Court will indulge me, I will read the letter?

Philadelphia, August 5th, 1802.

Meſſrs. Henry & Pearce,

GENTLEMEN,

As it may not be in my power to meet you to-morrow, at the coffee-houſe, I take the liberty of handing you the only

opinion I can form, after the moſt mature deliberation, in the caſe between Thomas Paſſmore and the underwriters, on the brig Minerva.

From the teſtimony of the ſhip-carpenter who repaired the Minerva previous to her ſailing, and there being no intimation given in the report of the ſurveyors, of any latent defect in the veſſel to which the leak and other misfortunes might, or ought to be attributed; I am of opinion, that ſhe was ſea-worthy at the time of her ſailing.

In looking over Park, on inſurance, I find the following remark, page 251—"Every ſhip inſured, muſt be tight, ſtaunch, &c. but, it is ſufficient, if ſhe be ſo at the time of her ſailing, ſhe may ceaſe to be ſo twenty-four hours after her departure, and yet the underwriters will continue liable."

From the captain's proteſt, and other teſtimony, it appears reaſonable to conclude, that the accident the Minerva met with in the Delaware, was the principal cauſe of the leak and other circumſtances which broke up the voyage. I am, therefore, of opinion, that the caſe is widely different from that (alledged to be in point by Mr. Pearce) of the Mill's frigate. I have carefully examined this caſe, and find the following circumſtances ſet forth, Park on inſurance, page 256—"The Mill's frigate ſailed from Nevis, 6th July, at 8 P. M. and the next day at 4 P. M. without any bad weather, or extraordinary ſwell of the ſea, ſhe ſprang a leak; the ſurveyors report, that ſome of the iron bolts and ſpikes with which the timbers were faſtened, were broken. That was owing to ſaid bolts and ſpikes being decayed, that the plank ſtarted."

Upon the whole, gentlemen, I am of opinion, that the veſſel was ſea-worthy at the time of her ſailing, and that the underwriters ought to pay the loſs.

I am,
Gentlemen,
Reſpectfully,
Your obedient ſervant,
WILLIAM HASLETT.

This communication, ſir, was made in conſequence of my being under the neceſſity of leaving the city the day before the meeting of the referees. On the next day, Mr. Henry called on me in the country, and ſaid he had delivered my letter to Mr. Pearce, and Mr. Pearce declined ſerving, for reaſons which he ſtated. Mr. Henry and myſelf then drew up the award and ſigned it.

D. I wiſh Mr. Haſlett to ſtate, whether he can recollect from any of the means he had of refreſhing his memory, that

he had ſtated to the Court, that Mr. Bayard had not gone into a full ſtatement of his caſe?

H. I think, ſir, I ſtated laſt night that Mr. Bayard and Mr. Paſſmore had entered into a converſation generally.

R. I aſk Mr. Haſlett whether he did not inform the Supreme Court that Mr. Bayard was not preſent when the two referees gave him their ſtatements of the caſe, though Mr. Paſſmore was?

H. I really cannot now recollect, ſir; but we took our ſeats at the table, and we entered into a converſation generally on the buſineſs; but how far we had proceeded when Mr. Bayard entered, I cannot recollect.

D. Was there any ſtatement made before the referees after Mr. Bayard left the room?

H. I can only now recollect that the referees appeared diſpoſed to give me every information in their power.

D. I aſk the witneſs whether there was any thing ſaid to the umpire after Mr. Bayard had left the room?

H. I cannot recollect particularly any thing.

D. I am ſatisfied of the candor of the witneſs. I wiſh him to be particular as to what paſſed in Court. Whether it was not obſerved by Mr. Bayard's counſel that ſuch ſtatements had been made to the umpire after Mr. Bayard had left the room in which the referees were ſitting; and what was the reply made?

H. I have no recollection, ſir, of any reply having been made.

Mr. Boileau. The witneſs, when he was queſtioned yeſterday, obſerved that Mr. Bayard requeſted the referees not to come to a deciſion until certain papers were procured; I wiſh to know whether Mr. Paſſmore, or any of the referees replied to Mr. Bayard when he requeſted the poſtponement, and ſaid that the requeſt was unreaſonable?

H. Yes, ſir, that undoubtedly was my opinion.

Mr. Rodney. Whether he did not conſider the requeſt of Mr. Bayard as coming too late?

H. Yes, ſir.

Mr. Dallas. The witneſs has ſaid, that finding the difference between the referees, he had requeſted time to make up his mind; I wiſh him to ſtate, whether the referees had come to a concluſion, with reſpect to the poſtponement requeſted by Mr. Bayard, or on the merits of the caſe, before the adjournment?

H. I beg leave to ſtate, that I had come to no concluſion at the meeting.

D. I aſk the witneſs, whether the umpire ever met the parties at any ſubſequent period?

H. No, ſir; finding I was under the neceſſity of leaving the city, on account of the Yellow Fever, I made the communication I have read, to Mr. Henry and Mr. Pearce.

D. Did the ſubſequent meeting ever take place?

H. I never met with Mr. Henry and Mr. Pearce afterwards.

D. Was the adjournment made to the uſual place, and till the uſual time of meeting; and, did the referees ever meet at the uſual place and time?

H. I can only ſpeak for myſelf; my letter to Meſſrs. Henry and Pearce, was dated on the 5th, and the meeting was to be on the 6th of Auguſt; my family being out of town, rendered it impoſſible for me to attend.

D. I aſk Mr. Haſlett, whether Mr. Bayard ever had notice of this meeting?

H. He had no notice from me.

D. I aſk the witneſs, whether Mr. Paſſmore did not call on him at his ſeat in the country?

H. Yes, ſir; but ſubſequent to the time of the meeting.

D. Did not Mr. Paſſmore, accompanied by Mr. Henry, call at Mr. Haſlett's houſe in the country?

H. Yes, ſir; in the afternooon of the day after the meeting was to have been held, Mr. Henry and Mr. Paſſmore called to ſee me in the country.

D. Was not Mr. Paſſmore apprized of the letter being written by the witneſs to Mr. Pearce and Mr. Henry?

H. Yes, ſir; a copy of it was delivered to him alſo.

D. The witneſs has ſtated that he requeſted time to make up his mind, and that thereupon the referees agreed to adjourn; I wiſh Mr. Haſlett to ſtate the particular objects of that adjournment; whether it was to hear further ſtatements of the caſe or to give the umpire time to make up his mind?

H. There was no particular object ſpecified, to the beſt of my recollection, at the time we adjourned, but as the gentlemen had, to the beſt of my recollection, made up their minds, and as I had the liberty of taking the documents with me, I thought that at the next meeting I would be able to give my opinion.

JAMES MILNOR, Esq.—affirmed.

I have a very faint recollection from being for a very ſhort time in Court on the day on which the anſwers to the interrogatories were argued by the counſel of Mr. Paſſmore, and thoſe

of Pettit and Bayard; it appeared to me from the manner of Mr. Moſes Levy, the counſel of Mr. Paſſmore, that he was diſpleaſed at ſomething that had occurred, but I cannot ſay that I recollect any expreſſions that dropped from the Court, or either of the counſel while I was preſent. I was preſent, ſir, on the morning that Mr. Paſſmore was called forward to receive the ſentence of the Court. My ſitting in Court was inſide of the bar appropriated to the profeſſion; my attention was firſt drawn to the buſineſs by a queſtion from the Chief Juſtice, enquiring whether any thing had been done; the queſtion received an anſwer in the negative, but from whom, I do not recollect; Mr. Paſſmore was then called forward; the Chief Juſtice addreſſed himſelf to him, to this effect, that the Court had waited ſome time under a hope, that ſuch conceſſions would have been made to the party injured, as would have mitigated, if not done away the neceſſity of the ſentence, which the Court were about to give—or repented of the expreſſions; I am not ſure as to the words, but to the import, I am very poſitive; Mr. Paſſmore made ſome alluſions to the anſwers he had given to the interrogatories as to their being ſatisfactory and to his being willing to make any acknowledgement to the Court; but I am not certain that this was before or after ſentence; on which one of the members of the Court obſerved, that his anſwers were an aggravation of the offence; to the beſt of my recollection, this obſervation came from Judge Yeates. I think the Chief Juſtice prefaced the ſentence of the Court, with ſome obſervations on the danger of libels, and on the enormity of that one Mr. Paſſmore had been guilty of on Mr. Bayard; and the ſentence of the Court was pronounced, with which I preſume this honorable Court are acquainted. I obſerved, ſir, that I was not certain whether Mr. Paſſmore alluded to his anſwers to the interrogatories, before or after ſentence, but I am certain ſome ſuch alluſion was made. After ſentence, in the courſe of which, Paſſmore obſerved, that the reaſon of his not making an apology to Mr. Bayard, was, that he conſidered Mr. Bayard as the aggreſſor; I think it was on this obſervation of Paſſmore, that Judge Smith ſaid that this was adding inſult to injury. I do not know that I heard any other obſervations. Mr. Paſſmore appeared much ſhocked by the ſentence of the Court, and aſked for leave to go home to ſee his family; which the Court without heſitation granted.

Mr. DALLAS. I have no queſtions to aſk the witneſs.

SAMPSON LEVY, Esq.—sworn.

Mr. RODNEY. I wiſh Mr. Levy to ſtate what fell from the Court when Mr. Paſſmore was before them at the time when the rule to ſhew cauſe why an attachment ſhould not iſſue, was moved for, and at the ſubſequent time when ſentence was paſſed on him by the Court?

Mr. Levy. I was originally concerned in this amicable action from which all theſe proceedings have taken their riſe. In September term, 1802, the motion was made for a rule to ſhew cauſe why an attachment ſhould not iſſue for a contempt on an affidavit of one of the parties; that rule to ſhew cauſe was returned at the next Supreme Court, which I think was on the 8th of December of the ſame year; Mr. Paſſmore appeared agreeably to the rule in Court, I believe at that time, to the beſt of my recollection, the Court were applied to, to proceed againſt Mr. Paſſmore immediately; a diſcuſſion took place, however, before that; the Court upon the application of one of the counſel of Mr. Bayard ſtated to Mr. Paſſmore the nature of the offence he had committed in libelling gentleman of the character and reſpectability of Meſſrs. Pettit and Bayard as he, Paſſmore, had done; the Chief Juſtice made ſeveral obſervations on the impropriety of his conduct, which rouſed the attention of Mr. Paſſmore, and he applied to his counſel, ſuppoſing the Court had taken it for granted that he was guilty, and wiſhed the aſſiſtance of his counſel, or his interference in his behalf. My brother, I think, ſaid that that was not the uſual mode of purging offences of this kind, that the uſual mode was by filing interrogatories and anſwers. This introduced a ſhort diſcuſſion between Mr. Paſſmore's counſel and the counſel of Meſſrs. Pettit and Bayard. The Court however decided, notwithſtanding the oppoſition that was made to it by Meſſrs. Pettit and Bayard's counſel, that interrogatories ſhould be filed. After ordering that interrogatories ſhould be filed, the Court obſerved it was a very ſerious offence and would require ſome atonement on the part of Mr. Paſſmore. A recognizance was ordered to be entered into by Mr. Paſſmore to attend from day to day during the ſitting of the Court. Mr. Paſſmore, I think, then went from the Court; the buſineſs then paſſed by. On the 13th of December, in the ſame year, interrogatories were filed by the counſel of Pettit and Bayard. On the 16th of December, a motion was made by Mr. Dallas, or ſome of the counſel of Meſſrs. Pettit and Bayard, that Mr. Paſſmore file his anſwers with the interrogatories; and a few days after, I think the 27th, Mr. Paſſmore's counſel filed the anſwers. On the next day, which was the 28th, according to my recollection, the argument took place on the interrogatories and anſwers. On the argument the counſel of Mr. Paſſmore were heard; but I ought to have mentioned, that before the argument had happened; the Chief Juſtice wiſhed to know whether any thing had been done, on the part of Mr. Paſſmore, which would have rendered unneceſſary, in a degree, any ſentence of the Court; I think, to the beſt of my recollection, that Mr. Dallas ſaid that nothing had been done, ſave the anſwers to the interrogatories. The argument then commenced upon the interrogatories and the anſwers. Nothing further

was done on the day of the argument upon the interrogatories and anſwers. The next day, I think, it was the 29th, Paſſmore appeared again in Court. Paſſmore was called before the Court, when the Chief Juſtice explained the evil tendency of libels and their danger to ſociety and their obſtruction to the adminiſtration of juſtice, and conſidered the anſwers to the interrogatories rather an aggravation than a mitigation of the offence; the ſentence of the court was then given, agreeably to the records that have been exhibited here in evidence. After the ſentence had been given, Mr. Paſſmore ſtepped forward and obſerved to the Court, that he never had the leaſt intention to offer any indignity to the Court, or to the proceedings of the Court; indeed he made ſeveral obſervations to the Court, expreſſing his regret that the Court ſhould conceive that he had done any thing to warrant the proceedings againſt him. I think Judge Yeates obſerved that the ſentence of the Court had been given, and it was now too late to ſay any thing further. Smith, I think, concluded with the obſervation made by Mr. Milnor, "that it was adding inſult to injury." The counſel of Mr. Paſſmore aſked whether there would be any difference as to the jail he went to; the Court ſaid they certainly had no objections to the debtor's apartment, which was what the counſel wiſhed. It was then wiſhed by Mr. Paſſmore's counſel that he ſhould have liberty to go and ſee his family, which was aſſented to by the Court. I think this is the principal part or all I know with reſpect to the attachment: if the counſel wiſh to aſk queſtions I will anſwer them; or if the gentlemen have no objection, I will ſtate what I know from the commencement of this buſineſs?

Mr. Rodney. I would aſk Mr. Levy to ſtate, whether when the Court, ſpeaking of the libel, and ſaid it required a ſerious atonement—they particularly ſaid to whom that atonement was to be made?

L. The impreſſion upon my mind was, that certainly it was intended to Meſſrs Pettit and Bayard; I may be miſtaken.

R. Pleaſe to relate generally what you know of the commencement of this buſineſs.

L. On the 12th of July, 1802, there was an agreement took place between Mr. Paſſmore and the underwriters, to have an amicable ſuit of the diſpute of the loſs alleged to be ſuſtained by Mr. Paſſmore, on the policy of inſurance. In that agreement, all matters relating to the loſs on the brig Minerva, were to be left to Mr. Henry and Mr. Pearce, and that by an action to be brought by Mr. Paſſmore, againſt Meſſrs Pettit and Bayard, who acknowledged themſelves defendants, in order to end the controverſy; and that the other underwriters, whoſe names were in the body of the agreement, were to be bound by the deciſion. When this agreement was brought to me by Mr.

Paſſmore, as his counſel I conſidered it defective ; I conſidered it ſo, becauſe if there was a difference between the two referees, there was no controulling power to bring the matter to a deciſion ; I conſidered it defective, becauſe there was no action then pending againſt Meſſrs. Pettit and Bayard, and that that agreement contained no action, nor authorized one. I conſidered it defective alſo, becauſe it would not give that ſummary relief to Mr. Paſſmore, which another one that I adviſed would afford. I therefore, on the 13th, which was the day after, drew up a ſpecific amicable ſuit againſt Meſſrs. Pettit and Bayard, different in its ſpecific objects and legal operation, from the one he had brought to me. In that agreement to enter an action, I ſigned my name as the attorney for Mr. Paſſmore ; conſidering it neceſſary, that in entering a new action, that Meſſrs. Pettit and Bayard, would ſign their names to it, as eſſential to make it become an action, and I am confident, from my attention to proceedings in ſuch caſes, that I requeſted Mr. Paſſmore to get the ſignature of Meſſrs. Pettit and Bayard's attorney, or their names to it, in order to make it valid. As I obſerved already, I think I muſt have told him ſo, or that Paſſmore had given me aſſurances that ſomething of the kind would be done ; as an action never can be entered in a court of law, without adverſary proceſs, or the agreement of the parties themſelves. The impreſſions on my mind were, that Mr. Paſſmore was very ſenſible of the propriety of this mode of proceeding ; and in a very few days after, I drew another agreement ; I think it was on the 17th, I drew one ſimilar to that on the 13th, in which Phillips, Crammond & Co. James Lyle, and Nicklin and Griffith, were defendants ; ſubmitting the principles in diſpute to the ſame men, and on the ſame terms as that of Pettit and Bayard. This latter agreement was ſigned by the ſeveral defendants on the 17th, and entered on the records of the Supreme Court on the 19th of July. I do not recollect that I ſaw Mr. Paſſmore for ſome time after this ; I went into the country, and was gone for ſome time ; during my abſence, a young gentleman, who was then in my office, Mr. Brown, went to Mr. Burd's, and confeſſed a judgment on the report. When I drew theſe two agreements, I conſidered the agreement of the 12th of July. drawn and ſigned in Berrett and Shoemaker's office, as no more than a piece of blank paper ; it was like a common caſe which occurs every day. If I had been at home when the young man entered the judgment, I ſhould not, according to my practice, have entered them up, as the young man did—I ſhould have entered them on the back of the reports themſelves, according to the terms, as enſuring ſecurity. The execution was taken out alſo in my abſence, by this young gentleman, Mr. Brown. I did not return home, to the beſt of my remembrance, until after the execution was given up, as unte-

nable on the part of Mr. Paſſmore. Mr. Paſſmore called on me a day or two after I returned, he told me that my brother had given up the execution, and meant to rely upon the award. I think I mentioned that if the award could be confirmed, the debt would be perfectly ſafe, from my opinion of the gentlemen. He then expreſſed no diſſatisfaction at the execution being ſet aſide, and ſtill relied upon my brother to ſupport that award, and had various converſations with him, on the ſubject. The award, however, was ſet aſide, after a full argument on both ſides. I think I took a part in the argument myſelf; I do not know any thing of any importance after that. Any queſtions, the gentlemen may wiſh to aſk, I will endeavor to anſwer.

Mr. Boileau. I wiſh the witneſs to ſtate, whether, during the time he was in Court, Mr. Paſſmore did not endeavor to impreſs on the minds of the Court, that he meant no indignity to them, or to their proceedings?

L. I ſtated that (I thought) explicitly before; but I will anſwer the gentleman with great pleaſure, that he did, and did not diſcover the leaſt wiſh to throw any indignity on them, or their proceedings.

B. At what time was the judgment ſet aſide by the Court?

L. If I ſpeak from recollection, (although the record will correct my ſtatement, if it is erroneous) I ſhould ſay, on the 26th of March, 1803. However, the record is better evidence of that, than my parole teſtimony.

CROSS EXAMINED.

Mr. Dallas. At the time when interrogatories were firſt ſpoken of, and ordered to be filed by the Chief Juſtice, I wiſh Mr. Levy to recollect, whether Paſſmore, or his counſel, acknowledged the fact of having ſubſcribed and poſted up the publication?

L. To anſwer that queſtion to the beſt of my recollection, I can only ſay, that I do not recollect that it was acknowledged; he may have acknowledged it, but I do not recollect that he did.

D. What did the counſel of Pettit and Bayard ſay; did they not ſay that it was acknowledged generally, and it was denied?

L. From the impreſſion I now have, I think they were conſidered as admitted.

D. I aſk the witneſs, whether at the time the Court made uſe of the word *atonement*, it was conſidered in Court that Meſſrs. Pettit and Bayard were the perſons to whom the atonement was to be made?

L. It was; and I only draw my concluſion from the impreſſion that it was intended for them, as their names were mentioned afterwards.

D. I wiſh Mr. Levy to ſtate, whether he means to ſay that the names of Pettit and Bayard were mentioned at the time ſentence was pronounced on Paſſmore.

L. Yes, ſir.

D. I aſk the witneſs, whether he ſat near his brother, during the diſcuſſion of the attachment?

L. I ſat in the bar, but not along ſide of him; I ſat in the centre of the table, my brother ſat about ſix feet from me.

D. I wiſh Mr. Levy to ſtate, whether, at the time he was in Court, or at any time ſince, he heard his brother complain of his interruptions?

L. Never—the interruptions that I underſtand as having taken place, proceeded from a conviction, that the grounds taken by the counſel of Mr. Paſſmore, were not tenable; I never heard him complain of the conduct of the Court.

D. Did you, or did you not, obſerve any irritation in your brother, or was he compelled to ſit down?

L. I am ſenſible he was not coerced, nor did I diſcover any irritation.

D. What kind of interruptions were offered to the counſel of Mr. Paſſmore?

L. I obſerved before, not having taken a part in the diſcuſſion of the attachment, I cannot ſtate preciſely what the interruptions were; but I believe they were the ordinary interruptions of a Court of Law, when counſel offer matter not altogether conſiſtent with its rules or its practice.

D. I aſk Mr. Levy whether during that diſcuſſion he obſerved any conduct on the part of the Court that was overbearing or rude?

L. I certainly did not, ſir, either overbearing or rude; at leaſt I do not recollect it at this time.

D. I wiſh Mr. Levy to ſtate whether he can recollect that at the time he drew up the ſecond agreement he told Paſſmore that unleſs that paper was ſubſcribed by Pettit and Bayard it would not be efficient?

L. Certain I am, that in the firſt agreement I drew up, that I told him, or that he told me he would have them to ſign it.

D. I beg the witneſs to read the phraſeology of the inſtrument drawn by him, and ſay whether he did not conſider this as a ſubſtitute for the firſt agreement?

L. Certainly, ſir; the language is ſo plain that there can be no ground for a miſtake. I ſhould be aſhamed to draw an article and ſign the ſame as attorney, that was ſo defective as the firſt.

D. Whether, on the examination of the agreement, drawn up in the office of Berrett and Shoemaker, he thought it contained authority to enter an amicable action, or chooſe an umpire in the buſineſs?

L. Certainly not; and to explain which, permit me to read that amicable agreement, ſubſcribed by Pettit and Bayard, out of doors:

"We, the underwriters on the body, tackle, &c. of brig Minerva, Jonathan Lambert, maſter, inſured by Thomas Paſſmore, in the office of Shoemaker and Berrett, by a policy dated September 30th, 1801, hereby agree to abide by the award to be given by Matthew Pearce and Hugh Henry, in an action wherein the ſaid Thomas Paſſmore is plaintiff, and Andrew Pettit and Andrew Bayard are defendants, and authorize and empower Jared Ingerſoll, or any other attorney of the Supreme Court, to confeſs judgment againſt us for any ſum in proportion to our ſeveral ſubſcriptions, that may be awarded againſt the ſaid Pettit and Bayard; and I, Thomas Paſſmore, do alſo agree, that the award of the ſaid referees, ſhall be valid againſt me, and authorize Jared Ingerſoll, or any other attorney, to confeſs judgment againſt me, in an action or actions that I may bring againſt any, or all the underwriters who ſhall ſign this agreement. *In witneſs whereof*, the ſaid parties have hereunto ſet their hands, this 12th day of July, 1802:

THOMAS PASSMORE,
PETTIT & BAYARD,
WILLIAM CRAMMOND,
FOR PHILLIPS, CRAMMOND & CO.
JAMES LYLE,
NICKLIN & GRIFFITH."

No action being then pending, I conſidered this as an agreement, that an action ſhould be entered, and that this was for the expreſs purpoſe of entering an action then not brought, or pending.

D. I aſk Mr. Levy if that agreement ſubſcribed on the 12th of July had been ſent to the prothonotary with a mere caption on the back, whether Paſſmore would have been allowed to enter judgment until Mr. Ingerſoll had confeſſed judgment?

L. Clearly not.

D. I wiſh the witneſs to ſtate whether he and his brother conſulted together as the counſel of Paſſmore at the time of the argument when the judgment was ſet aſide?

L. Yes, I conſidered myſelf as the attorney in the buſineſs, becauſe my name was affixed to the agreement that authorized

the rule of Court for holding the arbitration; I conſidered my brother as the counſel of Mr. Paſſmore becauſe he was employed ſubſequently.

D. I aſk Mr. Levy whether it is not the duty of counſel to mark the cauſes of their immediate clients for trial?

L. It certainly is a profeſſional duty.

D. Whether it was not regularly marked for trial by the counſel for the plaintiff?

L. Yes, ſir.

D. I wiſh the witneſs to ſtate whether both ſides were fully and fairly heard by the Court?

L. It would be doing injuſtice to the Court if I did not ſay that it was as fair and impartial a hearing of counſel as ever was given.

D. I aſk the witneſs how long the argument laſted?

L. I believe the argument took up the beſt part of the day of what is called the day of argument.

D. What were the grounds of the deciſion of the Court for ſetting aſide the report?

L. I believe one of the grounds was, that juſtice had not been done, inaſmuch as certain papers had not been produced that were neceſſary, and time had not been allowed to procure them.

D. I aſk the witneſs whether in delivering the deciſion of the Court, reference was made to Parke on Inſurance, in the caſe of the Mills frigate?

L. I certainly recollect that the Court gave authorities, but the caſes I cannot recollect.

D. I wiſh Mr. Levy to ſtate whether this action is not now depending in the Supreme Court for trial by jury?

L. I cannot ſpeak poſitive, becauſe I have taken no notes. In October 1802, Mr. Paſſmore transfered his intereſt to Mr. Travis.

D. I aſk the witneſs whether he was preſent in Court at the time when the execution was ſet aſide, and whether Paſſmore was preſent during the diſcuſſion?

L. In the former part of my teſtimony, I have ſtated that I was not in Court during the whole time of the diſcuſſion; while I was in Court I recollect ſeeing Mr. Paſſmore there.

SAME DAY, *P. M.*

Mr. RODNEY. Mr. Levy has obſerved, in his examination of this forenoon, that the Court had made uſe of Mr. Bayard's

name, as the perſon to whom the atonement was to be made; I wiſh him to ſtate whether it was before or after ſentence was paſſed on Mr. Paſſmore?

Mr. Levy. In anſwer to that, on my examination I endeavored to diſcriminate. In the latter part of the diſcuſſion and after the ſentence of the Court, then it was that the Court mentioned the names of Meſſrs. Pettit and Bayard.

R. I aſk Mr. Levy, whether at that time the Chief Juſtice ſpoke to Mr. Paſſmore of any atonement to Meſſrs Pettit and Bayard, or to either of them?

L. I conſidered, from my recollection, the impreſſion to be general, that the conceſſion or atonement was to be made to Meſſrs Pettit and Bayard.

R. If I underſtood Mr. Levy, I think he ſtated that the original agreement, ſigned by Thomas Paſſmore, Pettit and Bayard, William Crammond, for Phillips, Crammond and Co. James Lyle, and Nicklin and Griffith, did not refer to any amicable ſuit then pending, or authorize the inſtitution of one?

L. The gentleman did not underſtand me fully; I either meant that an action was not pending, or that I knew of none, but what the amicable mode I then drew up authorized.

R. I wiſh Mr. Levy to ſtate, as he is in the habit of practiſing in Pennſylvania, whether, according to their practice, that agreement would have authorized him to inſtitute an action, and to have it referred to two referees?

L. If I am to be allowed as a witneſs to give my opinion, I ſhall ſay in anſwer, that I did not think that there was any thing in the original paper, ſigned by Nicklin and Griffith, Phillips, Crammond and Co. and the others, that would authorize entering an amicable action. I may, however, have been miſtaken in my opinion, as a lawyer.

R. Could the agreement drawn up by the witneſs, have had any effect, unleſs ſigned by Meſſrs. Pettit and Bayard?

L. Certainly not; as it was different in its form and legal operation, it was eſſentially requiſite and neceſſary to have the ſignature of Meſſrs. Pettit and Bayard to it.

R. I aſk the witneſs whether the firſt agreement would have been binding if the parties had met and decided on it?

L. It could not have been obligatory without.

R. Then I underſtand that the ſecond agreement was adopted by Mr. Levy becauſe he thought it a readier way of obtaining juſtice for his client?

L. Yes, ſir.

R. I wiſh the witneſs to ſtate, ſir, whether the firſt agreement was competent to adjuſt all the matters in variance and to give judgment?

L. If the referees had met and decided, the authority might extend to a judgment in general terms.

R. I aſk the witneſs, whether there were any objections made by the defendants in writing or argument to the authority of the umpire to decide on the matters in controverſy?

L. None, that I recollect, but what appeared upon the exceptions filed by Mr. Bayard.

R. I aſk Mr. Levy whether he recollects that the courſe of the argument went to ſhew that the umpire was appointed with Mr. Bayard's conſent?

L. I could not ſpeak with certainty from my recollection. As far as reſpects myſelf I bent my argument upon Mr. Bayard's meeting the referees after the appointment of the umpire.

JOSEPH HOPKINSON, Eſq.—ſworn.

I was in the Supreme Court of Pennſylvania, in the term of December, 1802, at the time when Mr. Paſſmore was brought before the Court, to anſwer to a rule obtained againſt him at the preceding term, to ſhew cauſe why an attachment ſhould not iſſue againſt him for a contempt. The contempt alledged, conſiſted in a certain publication of M. Paſſmore, againſt Pettit and Bayard, reſpecting a ſuit then depending in Court. When Mr. Paſſmore appeared before the Court to anſwer this rule, I do not recollect any expreſs confeſſion of the fact of publication, but I am ſure it was not denied, and I am certain that it was taken for granted on both ſides. I believe the counſel who had obtained this rule, urged that as the fact, which could form the only ground of defence, had not been denied, the Court might proceed to puniſh immediately, or move for the attachment. There was ſome altercation on this ſubject, by the counſel employed on the different ſides of the queſtion; at length, Mr. Moſes Levy, who was counſel for Mr. Paſſmore, addreſſing himſelf to the counſel on the oppoſite ſide, uſed theſe expreſſions: "Gentlemen," ſaid he, "we had better proceed regularly in this buſineſs; file your interrogatories." It was agreed to be done ſo. The interrogatories were filed; I do not recollect exactly upon what day. Mr. Paſſmore's anſwers were alſo filed. The queſtion then came properly before the Court, whether this rule ſhould be made abſolute—that is, whether the attachment ſhould, or ſhould not iſſue. I think Mr. Moſes Levy contended principally that no contempt had been committed, becauſe no cauſe had been depending in Court; and he contended further, that even if he were wrong in that poſition, that Mr. Paſſmore's anſwers had purged the contempt,

There was ſome heat, or warmth between the counſel of the different ſides, during this argument. Mr. Levy was frequently interrupted by the oppoſing counſel; ſometimes, I think once, they put a caſe into his hands which they would rely on, which is by no means an unuſual thing at the bar; there was, however, conſiderable heat; Mr. Levy was interrupted by the Court, I think more than once; but I am well ſatisfied, that this interruption was not rude towards Mr. Levy, nor did he, from his manner, conſider it ſo. I remember well one of the expreſſions of the Court, on one of the interruptions, which, I think, deſignates the character of the whole. "Mr. Levy, that would do, if your client had not confeſſed the fact, but it is not relevant as he has done ſo." From this, as well as from the general tenor of my memory, the interruptions of the Court were merely to confine Mr. Levy to the proper argument. Mr. Levy, after finiſhing what he had choſe to ſay, ſat down. After this argument had cloſed, I think the Court conſulted together a little while.—Mr. Paſſmore was then called forward; the Chief Juſtice ſtated to Mr. Paſſmore, in becoming language, wholly ſo, the nature of his offence, its obſtruction to the adminiſtration of juſtice, and the neceſſity the Court were under to puniſh it. I very well remember Judge Yeates uſing the expreſſion, that the anſwers to the interrogatories were calculated to aggravate the offence; but I cannot recollect whether at this particular time,—but I recollect it was ſaid. At this time, the Chief Juſtice obſerved to Mr. Paſſmore, that if he would make an apology to the party he had injured, it would influence the Court in mitigation of his ſentence. The ſentence was poſtponed, as I underſtand, to give Mr. Paſſmore an opportunity of making this apology. On ſome ſubſequent day, at the time appointed, Mr. Paſſmore was again before the Court, to receive their final judgment. In the firſt place, the Chief Juſtice enquired, whether any thing had been done, in compliance with the wiſh of the Court; alluding, I ſuppoſe, to the apology to be made. Mr. Levy replied there had not. The Court then proceeded to paſs ſentence. After the ſentence had paſſed, Mr. Paſſmore came forward and attempted to ſay ſomething to the Court, and I remember his uſing the term, that Bayard had been the aggreſſor. Judge Smith ſaid, it was adding inſult to injury. Judge Yeates ſaid, that "ſentence had paſſed, and they could hear no more." Some converſation then paſſed, as to the jail he was to be confined in, and ſome inſtances quoted, where the debtor's apartment had been uſed on ſimilar occaſions. Upon application, they granted the indulgence that Mr. Paſſmore ſhould be confined in the debtor's apartment. He then requeſted ſome other indulgencies, which were granted to him—ſuch as ſeeing his family, before he went to priſon. Mr. Paſſmore conducted himſelf with propriety before the Court; I ſaw nothing arrogant in his conduct, except his ſay-

ing that Mr. Bayard was the aggreſſor, after the Court had pronounced the ſentence.

CROSS-EXAMINED.

Mr. DALLAS. I wiſh the witneſs to ſtate whether Mr. Moſes Levy appeared to be irritated by the conduct of the Court, or that he ſat down in conſequence of the interruptions he had met with from the Court?

H. I am perfectly ſatisfied he did not ſit down from any ſuch reaſon.

D. I aſk Mr. Hopkinſon how near he ſat to Mr. Levy in the bar?

H. I ſat not more than two feet from Mr. Levy.

D. Did he hear Mr. Levy at the time he ſat down expreſs any diſſatisfaction at the conduct of the Court?

H. Certainly not; on the contrary he ſaid he had done all he could for his client. I know Mr. M. Levy to be a man that is not eaſily ſet down when he ſuppoſes he is in the right.

D. I aſk the witneſs, whether during the whole time of the argument, there was any thing rude or overbearing in the Court?

H. I obſerved nothing of the ſort, moſt aſſuredly.

D. I beg, Mr. Speaker, that I may not be underſtood as reflecting on the honorable Houſe of Repreſentatives, or the committee of grievances, by aſking the queſtion I ſhall now put to the witneſs. I aſk Mr. Hopkinſon, whether he was not ſerved with a ſubpœna from the committee of grievances, during the laſt winter, and if ſo, in what manner was it ſerved on him?

H. During laſt winter, there was a paper left at my houſe; I did not know by whom, as it was without a ſignature; it was marked below, as if it was a copy, but there was neither the ſignature of the chairman of the committee of grievances, or that of the perſon who left it, affixed to it. I never was ſerved with a ſubpœna.

D. Was he ever compelled by attachment to attend the committee of grievances?

H. Yes, ſir; but I never was ſerved with a regular ſubpœna perſonally; nor was the writing left at my houſe, in my abſence, to be conſidered as ſuch, for it did not bear any mark of having been iſſued by the committee of grievances; when I came before the committee, I explained the buſineſs, and they thought the juſtification ſufficient.

D. And they did not commit you?

H. No, ſir.

Adjourned till 10 o'clock to-morrow, *A. M.*

FRIDAY, January 11th, 1805.

Mr. BOILEAU. I wiſh the Court to indulge me in aſking Mr. Hopkinſon a queſtion, which naturally ariſes out of the anſwer Mr. Hopkinſon gave to the queſtion put to him by the learned counſel for the reſpondents, who has informed us that his queſtion was not intended in the ſmalleſt degree to reflect on the Houſe of Repreſentatives, or the committee of grievances. Relying on the candor and urbanity of that gentleman, I ſhall merely aſk the witneſs one queſtion, in order to enable the Court finally to decide with that virtue and rectitude which I truſt they will. He has ſaid that a paper was left at his houſe without being ſubſcribed by any perſon; I aſk him whether he did not know from whom it was, and for what purpoſe it had been left?

Mr. HOPKINSON. I did not know for what purpoſe, nor by whom it was left at my houſe. That paper, I believe, is in poſſeſſion of the committee of grievances. The paper was ſigned "copy," but not authenticated by the chairman of the committee of grievances, nor of any officer or perſon whatever. It was neither an original, nor an authentic copy. I have underſtood ſince, that Mr. Ludlam left that paper at my houſe, that he was appointed to do ſo by the committee of grievances, but that I did not know at the time it was left.

B. Did he not on the ſame day have ſome converſation with Mr. Ludlam on the ſubject, and what was that converſation?

H. That converſation was before I ſaw the paper. I think it was at the ſtate-houſe, a perſon aſked me in what manner I was going to Lancaſter. He told me that a number of perſons had propoſed taking a private carriage. As he did not ſay who he was, or what he was, (and as I did not then know Mr. Ludlam) I did not, I believe, make any direct anſwer.

B. Did he not go to the ſtage-office to make ſome enquiries about a paſſage?

H. Yes, becauſe although I was not regularly ſerved with notice, I did not know but that I might be, and I thought it proper to be prepared.

B. I wiſh Mr. Hopkinſon to ſtate the reaſons, why he altered his opinion and did not to go to Lancaſter at that time?

H. I did not alter my opinion. I had not determined to come to Lancaſter, but made the enquiries at the ſtage-office, leſt I ſhould be ſerved with a ſubpœna.

Mr. DALLAS. When I put the queſtion yeſterday to Mr. Hopkinſon, whether he was not ſerved with an attachment from the committee of grievances, my intention was to diſcover what was their opinion reſpecting attachments, for the pur-

poſe of bringing it into the view of the Senate. I wiſh Mr. Hopkinſon to ſtate, whether, when he was examined before the committee of grievances, there was any proof, by oath or affirmation, of the ſervice of the ſubpœna?

H. I never was ſerved perſonally with the ſubpœna, nor did Mr. Ludlam, when he ſaw me, inform me of an any authority by which it was ſerved.

JOHN KEBLE—ſworn.

MR. RODNEY. I wiſh the witneſs to ſtate to the Court, whether he was preſent in the Supreme Court when the argument on the attachment came on, and if he was, to relate what fell from the Court at that time?

Mr. KEBLE. Owing to bad health, I am apprehenſive that I ſhall not be able to make myſelf heard by this honorable Court; and further requeſt them to allow me to refreſh my memory by a reference to notes I have taken on the ſubject. In the forenoon of the 28th of Dec. 1802, I accidentally went into the Court-houſe, at which time his honor the Chief Judge, 'Squire Yeates and 'Squire Smith were ſitting on the bench. Within the time of my being in Court, Mr. Thomas Paſſmore was called upon by the Chief Judge to make his appearance; when the Chief Judge addreſſed Mr. Paſſmore on the ſerious conſequences which might have ariſen, even, I think the Judge obſerved the ſhedding of blood, by reaſon of a libel which he, Paſſmore, had ſtuck up in the city coffee-houſe, at Philadelphia, againſt Mr. Andrew Bayard of that city. The judge expreſſed his hopes that the above conduct of Mr. Paſſmore towards Mr. Bayard, proceeded only from a momentary heat of paſſion, and was concerned at the ſtubborneſs of Mr. Paſſmore in not availing himſelf in the long indulgence of an opportunity given him by the Court of making an atonement to Mr. Bayard on account of the libel. I am a little in doubt whether the Judge did not add "and contempt of Court;" which the Judge obſerved, would not only have mitigated, but done away the puniſhment he had incurred. I do not recollect any thing further in this matter, except that Mr. Paſſmore declared that he did not mean to pay the Court any diſreſpect. The Chief Judge then ſentenced him, I think it was, to 50 dollars fine, and 30 days impriſonment. Mr. Moſes Levy, in behalf of Mr. Paſſmore, aſked the Chief Judge if Mr. Paſſmore ſhould have leave to return home to refreſh himſelf, and that he might be accommodated with the ſame apartment that Mr. Duane had been accommodated with. In all which requeſts the Court immediately acquieſced. I would juſt obſerve that I was only a diſtant ſpectator.

R. I aſk the witneſs whether he was not near enough to hear diſtinctly what fell from the Court?

K. I was not near enough to hear diſtinctly; nor did I pay particular attention, as I had no idea of being invited here.

R. Did you hear what you have ſtated to fall from the Court?

K. To the beſt of my recollection.

Mr. LEACOCK, (one of the managers.) The evidence has ſtated, that Mr. Paſſmore had obſerved, that he did not mean to pay any diſreſpect to the Court; I wiſh him to ſtate whether the Court made any reply to Mr. Paſſmore?

K. I do not recollect, ſir.

JACOB SHOEMAKER—affirmed.

I was called as an evidence, when Thomas Paſſmore was ſhewing cauſe on the rule to ſhew cauſe why the judgment ſhould not be ſet aſide. I was examined then as to the inſurance made at the office of Shoemaker & Berrett. I was not in the Court when the motion for an attachment was made, but at the time that ſentence was paſſed upon him. I came into Court about five minutes before Paſſmore was called to receive his ſentence. I recollect, the Chief Juſtice, prior to paſſing ſentence, took occaſion to remark on the conduct of Thomas Paſſmore, in poſting up at the coffee houſe, a libel on the character of Pettit and Bayard, which daring breach of the peace might occaſion the ſhedding of blood. He obſerved, that this being done while an action was depending in Court, it was a contempt of the Court; that he had been indulged with conſiderable time, and been allowed to purge himſelf by anſwers to interrogatories; that the Court had hoped he would by ſome conceſſions, have prevented the neceſſity of paſſing judgment upon him; inſtead of which, he had aggravted the offence by his anſwers. He then proceeded to paſs the ſentence of the Court. I do not give this as the exact words of the Chief Juſtice; they are merely given according to the recollection I now have. After ſentence was paſſed, Thomas Paſſmore addreſſed the Court again, it appeared to me, with the intention of juſtifying his conduct, but was interrupted by Judge Yeates, who obſerved to him, that he had heard the ſentence of the Court, and therefore could not be ſuffered to go on further. I then left the Court.

Mr. RODNEY. I aſk the witneſs, when the Court obſerved that it was a dangerous libel, whether the Chief Juſtice, or ſome of the Judges, ſaid, that ſo far as reſpected the Court, Mr. Paſſmore's anſwers had ſatisfied them?

S. I believe Judge Shippen did ſay, that his anſwers with reſpect to the Court, had been full.

R. Did he not expreſs himſelf, as ſatisfied with the anſwers of Mr. Paſſmore?

S. I do not recollect the words at this time ; but the impreſſion on my mind is, that the Court conſidered the anſwers, as far as reſpected themſelves, as full ; and were fully ſatisfied with the anſwers, as to the intention of inſulting the Court.

R. I do not expect the witneſs to ſtate the exact language, only the import ; did not the Court enpreſs themſelves ſatisfied by the anſwers ?

S. It occurs to my recollection, that the Judge made a remark on that part of the ſubject, "that there were contempts, which, although they were not immediately directed to the Court, yet that they had ſuch an operation as required them to be corrected by law."

R. Did you underſtand at the time conceſſions were mentioned, that the Court ſaid the conceſſions were to be made to Pettit and Bayard ?

S. I do not recollect that the Chief Juſtice mentioned that they were to be made to Pettit and Bayard ; but that was the impreſſion on my mind at the time.

R. Did you underſtand the Court as ſaying, that if the conceſſion had been made, it would have excuſed them from pronouncing judgment ?

S. I did.

CROSS EXAMINED.

Mr. DALLAS. I aſk the witneſs, whether in that part of the obſervations of the Chief Juſtice, on the nature of libels, which he has ſtated in his teſtimony, whether he did not diſtinguiſh between thoſe contempts committed againſt the Court, and thoſe that were an obſtruction to the adminiſtration of juſtice ?

S. That was the idea I meant to expreſs. The judge drew a diſtinction between thoſe kind of contempts, which were only an inſult to the Court, and thoſe that were an obſtruction to the adminiſtration of juſtice.

D. Did he not obſerve, that the contempt Paſſmore had been guilty of, was of the latter deſcription ?

S. That was the impreſſion on my mind.

D. Did the Judges on this occaſion, uſe any rude or intemperate language towards Paſſmore, or his counſel ?

S. They did not while I was preſent. On the contrary, my impreſſion was, that Judge Yeates wiſhed to ſtop him from committing a further offence. I thought ſo by the manner.

D. I aſk the witneſs, whether, at the time the word atonement was uſed, the Judge connected it with the names of Pettit and Bayard ?

S. No ; I do not recollect his mentioning the names of Pettit and Bayard at that time ; but the impreſſion on my mind was, that they were the perſons to whom the atonement was to be made.

D. I wiſh to know, whether, at what time previous to the publication being made, it was that Paſſmore called on the witneſs, and told him he would publiſh Meſſrs. Pettit and Bayard ?

S. I cannot be certain as to the day when Thomas Paſſmore called upon me and mentioned it, but I believe it was the very day, on which he put up the paper at the coffee-houſe. He told me that he was determined to poſt Bayard at the coffee-houſe ; I endeavored to perſuade him not to do it, and repreſented to him that its probable conſequences might be a duel, and that it might be conſidered a contempt of Court ; and I reminded him of Oſwald's caſe.

D. I underſtand the witneſs to ſtate this converſation to have paſſed before the paper was put up ?

S. I think on the forenoon of the day on which he put up the paper.

D. I aſk the witneſs, whether Paſſmore had ſtated the act as done, or that he would do it ?

S. He ſpoke in words of the future—"I will do it."

D. I wiſh the witneſs would ſtate the whole converſation ?

S. I mentioned Oſwald's caſe, who, I underſtood, had incurred the penalty for publiſhing, reſpecting a cauſe depending in Court ; he replied, he had conſulted counſel, and they had replied that it was no contempt.

D. I will now call the attention of the witneſs, to what aroſe from the abandonment of the brig Minerva. Mr. Shoemaker will ſtate, what he knows of the inſurance of the veſſel, what documents and papers were produced to him, on abandoning the veſſel to the underwriters, and all the ſubſequent proceedings thereon ?

S. Not ſuppoſing that queſtion would have been aſked, I neglected to furniſh myſelf with with the dates, from the books. The inſurance on the brig Minerva, was made in June 1801. Not long after which, a few weeks perhaps, Paſſmore brought a proteſt to our office, ſtating the veſſel having put into New-Brunſwick in diſtreſs, having ſprung a leak. After looking at the proteſt, I mentioned the underwriters were not diſpoſed to pay any loſs, as they knew of no accident to occaſion any. He mentioned the veſſels having drove foul of another in the river, as having been ſufficient to cauſe a leak. I obſerved, that ſhe had anchored during a calm, and the leak was occaſioned by the anchor's fouling. The leak did not

commence till two days after ſhe got to ſea. He perſiſted, and I, agreeably to uſage, gave notice to the underwriters of his lodging the proteſt. A few days after that, he lodged a ſecond proteſt, which ſtated, to the beſt of my recollection, that the people had refuſed to go in her, after ſome repairs had been made on her at St. Johns. At the uſual period, after thirty days from the lodging of the proteſt, Thomas Paſſmore, having offered an abandonment to the underwriters, we called on him to know the loſs, which they refuſed to pay, alledging, from circumſtances in the proteſt, the veſſel could not have been ſeaworthy at the time ſhe ſailed. Thomas Paſſmore inſiſted upon his claim, and I had ſome converſation with the underwriters, who refuſed to comply with the demand. After ſome time, Paſſmore called on me, and mentioned they were diſpoſed to ſettle the matter by reference, and aſked me to draw up an agreement to ſettle the matter by rule of Court and a reference; I endeavored to decline it, conſidering it buſineſs rather for a lawyer; but as he told me it was the wiſh of the underwriters and himſelf, I drew up the agreement, but left a blank for the names of the parties and the referees. I do not recollect any thing further, till he bronght the award of the two gentlemen to me, and requeſted that I would draw an order on the back of the policy. Paſſmore ſaid that the others would ſign it; he objected to ſending it firſt to Pettit and Bayard, and requeſted me to ſend it to James Lyle, who, he ſaid had obſerved, "that no honeſt man would now refuſe to pay." I ſent it up to Lyle, by a young Frenchman, that we had at that time, but ſince dead, and he brought it back, ſigned by James Lyle. Paſſmore deſiring that Pettit and Bayard might be the laſt the order was ſent to for ſignature, I ſent it to Phillips, Crammond, and Co. but they not being at home, the young man left it there.

D. How near did the witneſs live to Meſſrs. Pettit and Bayard, at that time?

S. Our office was in South Front ſtreet, No. 9—Pettit and Bayard's office was within a hundred yards North-eaſt of us. Paſſmore procured the paper, and procured the ſignatures of Phillips, Crammond and Co. and Nicklin and Griffith. Several days elapſed, how many, I cannot tell, before the demand was made on Pettit and Bayard. I did not preſent the paper to Pettit and Bayard, till ſome time after, when the diſpute had taken another turn. Soon after this, I was much cenſured by Lyle, Phillips, Crammond and Co. and Nicklin and Griffith; Lyle ſaid that when he ſaw the order in my hand writing, he had ſigned it without heſitation, and thought all was right. We paid the different ſums of the order to Paſſmore. I called on Bayard, and told him the four days had elapſed, and I ſuppoſed it was now a judgment, and he told me had entered exceptions, and would not pay, unleſs compelled to it by a legal proceſs.

D. I aſk the witneſs, whether it was not at the inſtance of Paſſmore himſelf, that the order was preſented laſt to Pettit and Bayard?

S. Expreſsly ſo.

D. When the papers were returned to you by Paſſmore, was the ſecond proteſt among them, and how long did it remain in your hands?

S. The ſecond proteſt was returned to him a few days after he left it.

D. What motives did Paſſmore aſſign, for keeping back the proteſt?

S. I do not recollect what reaſon.

D. If his memory enables him, I wiſh the witneſs to ſtate, what were the contents of the ſecond proteſt?

S. I cannot ſtate with exactneſs; but to the beſt of my recollection, it was a proteſt of the captain, that the ſeamen would not go in the veſſel.

D. How long did the other papers lie in your hands?

S. They remained a conſiderable time; Thomas Paſſmore took them away.

D. Did not Paſſmore ſtate the ſecond proteſt as being loſt?

S. A ſuggeſtion was made, that it was loſt.

D. I aſk the witneſs, if the letter of abandonment ſpecified the amount of the expence of repairs?

S. I believe that, at that time the report of the ſurveyor was produced, ſtating, that the veſſel would require repairs to the amount of about thirty-two hundred dollars.

D. Was there any account of the expence of repairs rendered at the time the abandonment was made?

S. I don't recollect that he produced any account at that time.

D. I aſk the witneſs, whether an account was not exhibited of the timber uſed in repairing the veſſel?

S. That was long after—it was not until the next fall. I don't recollect the amount. I remember ſeparating the article of timber, in order to aſcertain whether ſhe had much rotted in her timbers. To the beſt of my recollection, it was about 27 pounds Halifax currency,—which is four dollars to the pound.

D. Mr. RODNEY. I wiſh the witneſs to ſtate, whether, when he was ſworn before the Supreme Court, he was examined on the ſubject of his converſation with Mr. Paſſmore, relative to the poſting of the libel.

S. I do not recollect, that ever I gave that teſtimony any other where than here, and before the committee of grievances. To the beſt of my recollection, when I was examined before the Supreme Court, it was only with reſpect to the inſurance.

Mr. DALLAS. I aſk the witneſs, whether he gave this information to the committee of grievances?

S. I did.

Mr. RODNEY. The witneſs has ſtated that he had cautioned Mr. Paſſmore, and had cited Oſwald's caſe; I wiſh him to ſtate, how long it was after this caution was given, that you heard of Mr. Paſſmore's having poſted up the paper?

S. I believe I did not hear it, until the day following, when the caution was given. I believe it to be on the very day when it was put up.

R. When this caution was given, did Paſſmore inform you that he had obtained judgment?

S. My recollection is not very ſtrong upon the ſubject; but to the beſt of my recollection, he ſaid that judgment had been obtained.

R. Did you know of any rule to ſhew cauſe why the judgment ſhould not be ſet aſide, being depending in Court at that time?

S. I have obſerved, that the rule to ſhew cauſe had been intimated to me, by Bayard's information, that exceptions to the award had been filed.

R. Did you underſtand, that if the conceſſion had been made, it would have precluded the neceſſity of paſſing ſentence?

S. Yes, I did.

R. Did you conceive that the atonement to be made, related to a contempt offered to the Court, or to the perſonal contempt?

S. To the perſonal contempt.—If I recollect right, the Chief Juſtice ſaid "the Court hoped you would have made thoſe conceſſions." I underſtood the judge, that if the proper conceſſions were made, it would mitigate, or do away the contempt—and as to whom they were to be made—my own mind was bent on Pettit and Bayard.

R. I aſk the witneſs, how long after the abandonment was made, it was before the award was given?

S. If I recollect right, the abandoment was made in the fall of 1801, and the report of the referees in Auguſt following.

R. In conſequence of what the witneſs has ſaid, it becomes neceſſary to aſk Mr. Hopkinſon one queſtion more.

I wiſh Mr. Hopkinſon to ſtate, whether he does not recollect that the Court mentioned Pettit and Bayard's names at the time of paſſing ſentence.

Mr. HOPKINSON. Not at the time of paſſing ſentence, but after the argument had been cloſed ; then it was that "apology to the party he had injured," was mentioned.

Mr. DALLAS. I aſk the witneſs one queſtion. Whether he does not recollect that the Court made a diſtinction between the nature of contempts ?

H. I remember that the Court ſeemed ſatisfied, ſo far as regarded themſelves—but, by "themſelves," I conſidered that they meant ſo far as regarded themſelves perſonally. But that the offence was as to the Court and the obſtruction of juſtice.

GEORGE LUDLAM—ſworn.

Mr RODNEY. I wiſh the witneſs to ſtate to the Court, if he was preſent in Court, when ſentence was pronounced on Mr. Paſſmore, and to relate what happened at that time ?

Mr LUDLAM. I was preſent in Court, when ſentence was pronounced on Mr. Paſſmore. The firſt thing that I heard, was the name of Mr. Paſſmore. When he was called, the Judge aſked, if there had been any thing done in the buſineſs. He was anſwered from one of the counſel, I do not know which, "no." The Judge then turned to Mr. Paſſmore, and told him that it was a heinous crime he had committed, and the dangerous conſequences it had upon the community, that the Court had ſhewed as much lenity as in their power, by giving time for accommodation, and were ſorry that an accommodation had not took place, which would have prevented the diſagreeable neceſſity of paſſing judgment. He then pronounced the ſentence of the Court, which was 30 days impriſonment, and 50 dollars fine. I think Mr. Paſſmore then addreſſed the Court by ſaying, that he thought if there was any apology to be made, it ought to come from Meſſrs. Pettit and Bayard. One of the Judges made anſwer, that it was adding inſult to injury. Mr. Paſſmore went on further, and ſaid he did not mean it as a contempt of the Court. Judge Yeates ſaid, the Court had paſſed their judgment, and that what would be ſaid now, was of no uſe. The counſel then interceded for Mr. Paſſmore, to ſee his family, likewiſe a particular apartment in the jail ; both which the Court readily agreed to. That is all that I can recollect as to this part of the buſineſs.

CROSS EXAMINED.

Mr. DALLAS. I aſk the witneſs, whether, during the time he was in Court, he obſerved any conduct in the Court, that was rude or overbearing ?

L. No.

D. On the contrary, was not their conduct mild and admonitory?

L. I thought ſo.

Mr. BOILEAU. Mr. Speaker, if it is equally convenient for the Court to adjourn at this time, it is perfectly convenient for the managers, as the next witneſs we propoſed to examine, I do not ſee in Court.

Mr. STEELE. From the ſituation of the health of our Speaker, I think it better to continue a little longer, and then adjourn until to-morrow morning at 10 o'clock.

Mr. LANE. As the gentlemen do not appear to be prepared, I think we had better adjourn.

Mr. WHITEHILL, *the Speaker.* Is it the pleaſure of the Court to adjourn?

The Court then adjourned until to-morrow morning at 10 o'clock.

SATURDAY, January 12th, 1805.

Mr. BOILEAU. If it is agreeable to the Court, Mr. Speaker, I will aſk Mr. Ludlam one or two queſtions more. I wiſh Mr. Ludlam to ſtate to the Court, whether he was not deputized by the Sergeant-at-arms, to ſerve ſubpœnas?

Mr. LUDLAM. Yes, ſir.

B. Pleaſe to relate what paſſed?

L. Accompanied with Mr. Paſſmore, I went round with the ſubpœnas, and called at Mr. Hopkinſon's, on my way to Mr. Hurry and to Mr. Brown. I waited on them, and found them both at home; Mr. Henry I did not ſerve with a ſubpœna, as I always looked upon him as a volunteer in the buſineſs. I then went to Mr. Hopkinſon's, but he was not at home, and I left the paper at his houſe. I went and ſaw him at the Court-houſe; I then, I think, but will not be certain, that I aſked him if he had ſeen the paper I had left at his houſe.

B. I aſk the witneſs, whether or not, he did, on this, make an affidavit, ſtating he had ſerved the ſubpœnas agreeably to his inſtructions?

L. I believe I did. I had inſtructions, if I did not find them at home, to leave them at their houſes.

Mr. DALLAS. Did Mr. Ludlam ever before know Mr. Hopkinſon?

L. No, ſir.

D. Did he not hear the teſtimony of Mr. Hopkinſon?

L. Yes, ſir.

D. Has he not ſaid, that Mr. Hopkinſon's teſtimony correſponded with his own?

L. Yes, ſir.

Mr. DALLAS. After the adjournment of the Houſe yeſterday Mr. Hopkinſon wiſhed to know whether he might have liberty to return home, and was anſwered "yes." He was right when he did apply to return home, but I could have wiſhed him to have been preſent at this examination. I beg the Senate to underſtand that I had not the remoteſt intention of impeaching the motives, nor of calling into view the conduct of the committee of managers, the Houſe of Repreſentatives or the committee of grievances, when I put the queſtion to Mr. Hopkinſon. It drew from him an anſwer which ſeemed to operate upon the committee of grievances. Therefore to juſtify the grounds upon which the committee of grievances proceeded, it is only neceſſary to ſtate that if the information had been given, that is, if the ſubpœna had been regularly ſerved, and Mr. Hopkinſon had not complied with its requiſition, the committee had for the due adminiſtration of juſtice, but one reſource, that of compelling his attendance, by attachment.

J. P. RIPLEY—ſworn:

I was preſent in Court in September term, when the rule to ſhew cauſe was granted. I was preſent at December term, during a part of the argument, and on the day on which ſentence was pronounced on Mr. Paſſmore. The judgment of the Court was prefaced by ſome obſervations from the Chief Juſtice, on the nature of the offence committed by Mr. Paſſmore. The Court ſeemed to regret the obſtinacy of Mr. Paſſmore, and obſerved that if a conceſſion, or apology had been made, it would have been conſidered by the Court in forming their judgment. I cannot recollect the exact expreſſions. Sentence was paſſed upon Mr. Paſſmore, that he ſhould be committed for thirty days to the common jail. His counſel moved the Court to commit him to the debtor's apartment, which was granted. The Court indulged Mr. Paſſmore with permiſſion to ſee his family; Mr. Levy made the requeſts of the Court, and they were granted without heſitation.

On the 13th of July, 1802, Mr. Paſſmore called at the office of the prothonotary of the Supreme Court, with an agreement to enter an amicable action, to refer the matter in diſpute between him and Pettit and Bayard, and the other underwriters. This agreement was ſigned by the parties only. I obſerved to Mr. Paſſmore, that it was not regular to enter it,

unleſs the attorney's name was marked on the record. He then took away the agreement, for the purpoſe of applying to an attorney. Soon after he returned, and brought the ſame agreement, with a ſtatement of a rule of reference, drawn up by Mr. Levy, and in his hand writing, and indorſed with the agreement of the parties. Suppoſing that Mr. Levy had merely ſtated the rule of reference in a more formal manner, I inadvertently entered the rule.

On the 6th of Auguſt, 1802, a report, ſigned by Mr. Henry, one of the referees appointed in the original agreement, and by Mr. Haſlett, was brought to the office, and judgment entered. Within a few days after, Mr. Paſſmore applied for an execution. The error in inſerting the rule, had, in the mean time, been diſcovered and communicated to Mr. Burd. Mr. Burd ſaid, that no execution ſhould be iſſued, under this judgment. On Mr. Paſſmore's applying for an execution, Mr. Burd explained the illegality, and informality of iſſuing the execution. After repeated applications, on the part of Mr. Paſſmore, without effect, judgment was confeſſed under the warrant of attorney, contained in the original agreement. Mr. Burd then told me to iſſue the execution, that it was the attorney alone who was reſponſible for the illegality of the proceeding.

CROSS EXAMINED.

Mr. DALLAS. I underſtand the witneſs has been a clerk in the prothonotary's office a long time; I wiſh him to ſtate, how long he was in that office?

R. About three years, ſir.

D. What is the mode of marking cauſes for trial; is it not done by the attornies, without the participation of the Court?

R. Generally ſo, ſir.

Mr. BOILEAU. The witneſs has ſtated, that he had been in the prothonotary's office, about 3 years—does he recollect the particular years of his being there?

R. From 1799, to the beginning of 1803.

Mr. HURRY—ſworn.

I was in the public room at the merchant's coffee-houſe in Philadelphia, at the time when Mr. Paſſmore poſted a certain paper on the place where advertiſements are uſually affixed. I immediately ſtepped forward to read the contents, but was prevented by the keeper of the coffee-houſe, Mr. Kitchen, who pulled it down and put it into his pocket. That is all that paſſed in the coffee-room. I afterwards ſaw Mr. Paſſmore on the ſteps; I told him that Mr. Kitchen had torn down the pa-

per, and requeſted he would inform me of the contents. I do not recollect what he ſaid, but the name of Mr. Bayard was mentioned. But as a number of people collected on the ſteps, I walked into the coffee-houſe again, and requeſted Mr. Kitchen to let me ſee the paper; he ſaid he made it a point to deſtroy thoſe kind of papers, to prevent miſchief.

Mr. RODNEY. I aſk the witneſs, as he was preſent when the paper was poſted up, whether it was poſſible from the time it was poſted up by Mr. Paſſmore, 'till it was taken down by Mr. Kitchen, for any perſon to have read it?

H. I believe not; I believe I was firſt at the deſk where it was poſted.

CROSS-EXAMINED.

Mr. DALLAS. I wiſh the witneſs to ſtate, whether Paſſmore had left the coffee-room when Mr. Kitchen tore the paper down?

H. He was in the act of leaving the coffee-room at the time.

D. I aſk the witneſs whether it was not a matter generally ſpoken of in the city?

H. It was at the coffee-houſe; and I believe I heard it thro' ſome parts of the city.

D. I wiſh the witneſs to ſtate whether it was not conſidered as the poſting of Meſſrs. Pettit and Bayard?

H. It certainly was.

D. The witneſs will ſtate whether he has been examined on this buſineſs before the Supreme Court?

H. No, ſir.

Mr. RODNEY. I aſk the witneſs whether it was conſidered as any thing more than a common caſe of poſting?

H. I was unacquainted with the grounds; but it was ſpoken of as a common poſting.

R. Did any one ſuggeſt its having reference to any cauſe pending in Court?

H. Not to my knowledge.

Mr. BOILEAU. Mr. Speaker, we have gone through the teſtimony, on the part of the proſecution, except as to aſking Mr. Henry a few queſtions.

I wiſh him to ſtate to the Court what he heard reſpecting the arguments of the counſel when the award was ſet aſide?

Mr. HENRY. Having been ſubpœned to give evidence in the March term 1803, I attended at the Supreme Court, which I believe was the term that the report and award was ſet aſide.

I think it was near the commencement of the trial for argument, and I think after the firſt or ſecond witneſs had been examined; I was walking on the outſide of the bar, where it is common for people to walk and ſtand in, when Mr. Dallas came out of the bar; if my memory ſerves me, I think he caught me by the arm, and I think addreſſed me in this way, "Mr. Henry, we ſhall put Paſſmore completely on his back before the Legiſlature." I muſt ſay, ſir, that the obſervation ſurprized me a little—I was apprehenſive, it appeared to me, that ſome advantage would be taken of that trial—the deciſion of that trial. As ſoon as I had an opportunity of ſeeing Thomas Paſſmore——

Mr. INGERSOL here roſe and objected to this kind of teſtimony, as tranſgreſſing all the rules that he had ever ſeen in open Court, and Mr. Rodney conſented that the teſtimony on the part of the proſecution ſhould now cloſe.

MR. DALLAS.

Mr. Speaker, and

Gentlemen of the Senate,

ALTHOUGH I was given in the courſe of converſation to underſtand, that the teſtimony on the part of the proſecution, would occupy the remainder of this day, yet the circumſtance of its being cloſed at this time, will cauſe no embarraſſment on our part. I ſhould, however, have received it with greater ſatisfaction, had it not been for the abrupt manner in which it has cloſed.

It is now nearly 12 months, ſince three of the Judges of the Supreme Court of Pennſylvania have been accuſed of an high miſdemeanor in office. Since the firſt period of the accuſation, they have obſerved a rigid and profound ſilence. And, altho' the repreſentations of Thomas Paſſmore, in his memorials to the Houſe of Repreſentatives, conſtantly met their eye; although they have commonly been retailed in every newſpaper printed in the ſtate; although every report on this ſubject, made to the Houſe of Repreſentatives, has met publicity; although the preſs, and the ſquabbles of the preſs, and the lawyers, and Mr. Paſſmore, have annoyed the eyes and the ears of the Judges, let it be remembered to the honor and independence of thoſe worthy and venerable characters, that they have retained a profound ſilence.

Not only this, ſir, which evinces their ready acquieſcence in the laws of the country, and their reſpect for the conſtituted authorities. Not only this, ſir, but we have ſeen thoſe Judges, under the obloquy of ſuch public charges, under every ſpecies of odium and abuſe from the preſs, not only diſcharging the

duties of their office, but traverſing the different counties of the ſtate ; ſtill were they ſilent, although they well knew, that ſtrong and violent prejudices might operate againſt them. Sir, this was conduct worthy of them—conduct, which will do honor to themſelves and to the ſtate, and command the public gratitude : It not only does honor to themſelves in the abſtract, but ſuch conduct will enſure to them, from this high and reſpectable body, the opportunity of a patient and candid hearing. If I may be permitted to uſe the word policy, the conduct of the honorable and venerable gentlemen, might be called good policy, for they knew that all that was ſtated againſt them, was founded upon ex-parte teſtimony, and the partial ſtatements and repreſentations of an angry individual.

Far be it from me, ſir, to arraign the conduct of the honorable Houſe of Repreſentatives. On every ſtep that they have proceeded in this important buſineſs I ſpeak, and I truſt they will believe me when I ſay that not one particle of my confidence in them has been loſt. The proceeding has been ſuch as does honor to the Houſe. For when we recollect that theſe charges have been brought forward by an obſcure individual, totally ignorant of the law, whoſe paſſions were ſuperior to his prudence, and who ſuppoſed he had ſuſtained an injury—when we recollect that they are brought forward by a poor man reduced even to the unpleaſant ſituation which he has ſtated in his teſtimony—even to bankruptcy. When we conſider theſe circumſtances and take into view the conduct of the Houſe of Repreſentatives, we muſt be convinced that according to the information adduced to them, they have acted with the ſtricteſt propriety. I thank them for their attention to the ſubject. They have ſhewn that the pooreſt man in the community will be as patiently heard and receive the ſame juſtice as the moſt opulent and dignified.—My ſentiments are the ſame, ſir, with reſpect to the committee of grievances. From the nature of the charges and the teſtimony produced to them, it was their duty to act as they have done. It was proper and honorable to pay attention to a complaint of this nature, although the charges might tend to affix a blot upon the fair character of the Judges, which to this moment is unimpeached. I thank them alſo for their attention. If after all theſe charges, and the attendant circumſtances and inconveniences, it appears that the Judges have acted in a dignified and public manner, we have nothing to fear on the ſcore of prepoſſeſſion. I muſt obſerve, ſir, that I rely upon the candor and talents of the learned counſel on the part of the proſecution, upon the liberality of the managers on the part of the Houſe of Repreſentatives, and upon the impartiality and integrity of this honorable Court to diveſt themſelves of all prejudice, and to give due credit for upright and dignified conduct.

Some inconveniences, of a different kind, attend our defence. Circumſtances attendant on profeſſional character.

Attempts have been made to throw obloquy on the bar of Pennſylvania, by inſinuating that the aid of counſel for this proſecution could not be procured in the ſtate. The inſinuation is cruel and unjuſt. Profeſſional aid might have been as well furniſhed in Pennſylvania, as from any part of the union. If profeſſional aſſiſtance was wanted, I ſhould have thought that the application would not have gone to perſons, who had openly avowed their opinions, who ſtood in relationſhip to the Judges, or who had affixed their names to declarations, which ſanctioned the conduct of the Judges. There were many others at the bar, who were not thus circumſtanced, and whoſe talents and legal knowledge would eminetly qualify them to aſſiſt the managers on this occaſion. But they were not applied to. And, yet, has this circumſtance been made a ſubject of cenſure, even derogatory to the bar of Pennſylvania. I repeat Sir, that the charge is cruel and unjuſt, and as ſuch I repel it.

My worthy friend, one of the managers on the part of this proſecution, did not give the ſubject due conſideration, when he told this honorable Court that they were reſponſible to the people for the vote they ſhould give on this occaſion. Sir, no man in exiſtence, can have a greater reſpect for the rights of the people than I have,—but, ſir, when the people have deſcribed thoſe rights, and delegated the exerciſe and the care of them to proper conſtitutional authorities, I truſt we have ſomething more to govern our conduct, than an appeal to the people at the elections. Sir, I yield to and will always ſupport the principle that the people have the ſole right to organize and eſtabliſh government for their own ſafety and happineſs, but having done this they have no right to interfere with or deſtroy its operations. If they wiſh it, they certainly have the power to change the form of the conſtitution, but until the conſtitution is changed they muſt be governed ſolely by the delegated authorities.

I aſk the worthy manager, to reflect for one moment, on the conſequences of his doctrine. Let him look at that conſtitution. What is it but an inſtrument of reference? a declaratory and preventing ſtatute of law. Does it not declare, that every man for injury to his property or reputation, has to ſeek his remedy by a due courſe of law?—not by a reference to the people at elections. And will the gentleman be able to tell me, that for the expoſition of this, I have to appeal to the old conſtitution? And what, ſir, is the conſequence to ſay, that we ſhall reſort to an election to determine.

Again, ſir, is it not a material feature in our conſtitution, a conſtitution that has been eſtabliſhed to preſerve the liberty of

the people and to preſerve the order of the government, that "Trial by Jury ſhall be as heretofore." What *trial?* Many virtuous and good men, ſir, may not be able to define what is meant by this. But what is meant by "Trial, *by Jury?*"—that the trial ſhall be by jury, and that without the unanimous voice of the jurors, no man ſhall be found guilty. But what is meant by the words "as *heretofore?*" Let him take the conſtitution of 1776, under which we acted *heretofore*, and compare it with the conſtitution of 1790 and he will diſcover the relative and preciſe meaning.

Before the conſtitution of 1776 trial by jury did not exiſt in ſeveral inſtances, and deciſions were had on queſtions of property without any reference. This was the caſe in the Orphans Courts, in the Regiſters Courts and in the Courts of Admiralty, and all theſe Courts were inveſted with the proceſs of attachment.

Before the revolution of '76, the juſtices of peace in ſome caſes poſſeſſed ſummary powers—the ſame mode of proceeding is recognized over and over again—particularly in one caſe decided before Chief Juſtice Kinſey. In this caſe the Judge decided that there was a contempt, and the party ſuffered for it.

Under the conſtitution of 1790, the powers of this Court are eſtabliſhed. The people have conſtitutionally declared, that all impeachments ſhall be tried by the Senate—that you ſhall judge between them and the party accuſed. They have left it entirely to your deciſion, under an appeal to Divine Providence!—and will it be ſaid, that the people are now to be reſorted to?—an election talked of when the judgment of this Court is to be given? My diffidence only can cauſe me to withhold the expreſſion of my feelings.

Other inconveniences preſent themſelves. It is my misfortune, as the current opinion now runs, to belong to the profeſſion of the law. But I aſk, was it proper, was it candid, in the gentleman who is one of the managers of this proſecution, to ſay that all my defence would be eloquence and ſophiſtry?

I hope, however, that whatever gentlemen may think of lawyers when they ſpeak, they will believe them when they ſwear.

I appeal to the gentleman who is counſel for the proſecution, and aſk him, whether in a cauſe deeply intereſting to life and property, whether it would be a proper appeal to the Court and Jury to ſay "hear me, gentlemen, and alſo hear my colleague, but hear not one word of the oppoſing counſel, becauſe that all he intends to ſay, is mere eloquence and ſophiſtry.

However the profeſſion may be undervalued, I truſt that it will not ſuffer by a reference to hiſtorical record. When I look back to the commencement of our revolution, when I look to our then members of Congreſs, when I look back to the cabinet and the field, I may aſk, how ſtands the queſtion? What was the language? What was the riſque of the profeſſion at that time? I aſk the gentleman to look at the then exiſting ſtate of things, and appeal to his memory for the conduct of profeſſional gentlemen. I aſk him to look at the Federal government recently, to look into the individual ſtates, (not in the ſtate of Pennſylvania at this time) and let him ſee how the profeſſion is eſtimated. In the federal government, do they not poſſeſs the confidence of the people? At the head of that government, we ſee a lawyer, once a practiſing lawyer, a man who has ſet an example in the government, that will do more to perpetuate the excellence of republican government, than all the elementary writers in the world. Let us look into the Senate of the U. S. and there we ſhall ſee in the ſecond officer of government, a profeſſional character. And further, in the councils of the nation—who are Giles, Randolph, Nicholſon, with many other? Lawyers!—Lawyers!—Lawyers!—How is it then, when nothing but ſophiſtry is to be expected from the profeſſion, that theſe gentlemen ſhould have been called to ſuch high and dignified ſtations. If, ſir, there were not in our profeſſion, ſome unworthy characters, we ſhould be too honorable, we ſhould be too good; but the profeſſion is, like all others, made up of good and ſome bad men. As we poſſeſs the ſame ideas, as to right and wrong, we are as much entitled to credit as other men, when we make a ſolemn appeal to our God.

Sir, I would wiſh to approach more nearly to the ground of argument. I will endeavor, with the indulgence of this honorable Court, to give a brief narrative, or hiſtory of this buſineſs from its commencement. In doing this, I am willing to give up my notes, and rely upon memory, and I requeſt the honorable the Court, the counſel and the managers to obſerve whether I am not circumſtantially correct.

A number of gentlemen ſubſcibed a policy of Inſurance on the Brig Minerva. The veſſel ſailed, and in going down the Delaware met with a ſlight injury by running foul of another veſſel. In the courſe of her voyage for Europe, ſhe encountered bad weather; the weather did not do her much injury; ſuch, however, was the effect upon the apprehenſions of the crew, that when they arrived at a port in Nova Scotia, they declared that unleſs an enormous ſum was expended to refit the veſſel ſhe would not be fit for ſea. After all this they agreed to riſque themſelves on this rotten plank, provided the carpenter, after examination, ſhould declare her ſea-worthy. In this ſituation

of affairs, information was given to Mr. Paſſmore of the ſtate things were in. Two proteſts were tranſmitted to him; the firſt contained the report of an examination of the upper works of the veſſel; the ſecond contained a hint that cannot be miſunderſtood, "the veſſel was in ſuch a ſtate that the mariners refuſed to embark." An account of the ſurvey with a bill of the repairs upon the ſubſtantial timbers of the veſſel amounting to twenty-ſeven pounds, Halifax currency, were alſo forwarded to Mr. Paſſmore. Mr. Paſſmore upon this determined to abandon the veſſel; he called upon Mr. Shoemaker, the broker in this tranſaction, with the proteſt and the letter of abandonment? 30 days are in all ſuch caſes allowed the underwriters to enter their objections, or pay the loſs; as ſoon as 30 days had elapſed, after ſome negociation between Mr. Paſſmore and the underwriters, it was agreed to enter an amicable ſuit. So far from a wiſh for litigiouſneſs or procraſtination on the part of Meſſrs. Pettit and Bayard, Mr. Bayard was the firſt perſon who propoſed this mode of deciſion. It was then agreed to, but as it was inconvenient for all of the underwriters to attend to the ſuit, and as the ſame principle would operate upon all in the determination of the caſe, there appeared to be no neceſſity for the other underwriters to become parties in the action. This being done, from that moment, the underwriters placed all their confidence in Mr. Bayard, and they all conſidered themſelves as mere automata, to be moved by Meſſrs. Pettit and Bayard, and not upon the repreſentations of Mr. Lyle, Phillips and Crammond, or Nicklin and Griffith, nor, much leſs, upon the repreſentations of Mr. Paſſmore. Now, we ſhall ſee the conſequence. The agreement was drawn up in the office of Mr. Shoemaker, by which agreement, Mr. Henry and Mr. Pearce were appointed the arbitrators, to ſettle all matters in variance between the parties, with authority for Mr. Ingerſoll, or any other attorney to confeſs judgment upon the award. I beg leave to remark here, ſir, that every ſpecial authority muſt be ſtrictly purſued, and neither of the parties, nor their ſpecial attorney can, in the leaſt, deviate from its proviſions.

Mr. Sampſon Levy, not with a view to impede the progreſs of the buſineſs, but with a view to give body and form to the agreement, drew up a new form, by which the referees in case that they could not come to a deciſion were authorised to chooſe an umpire, whereas the original agreement gave no ſuch authority. It is the practice in the Courts of Law, that if a rule of reference is entered into between A. and B. and if they agree that the referees ſhall make a report in the office, and if exceptions are not filed, within four days after, the party is entitled to judgment. The prothonotary endorſes on the report *judgment ſecundum regulam*, that is according to rule.

But, when by the rule of reference there is an authority to an attorney to confeſs judgment, the judgment muſt be confeſſed by the attorney. The one is *a judgment by confession* ; the other, *a judgment according to practice.* In the preſent caſe, there were two rules. The ſecond entirely diſcordant in principle and equity with the firſt. The act of the prothonotary could not give the effect of a judgment to the firſt agreement, without a confeſſion of the attorney ; nor could an attorney confeſs judgment on the ſecond, becauſe it authorized judgment to be entered upon the report of the referees, and not by attorney. Where a man is to be affected by a judgment, he muſt have notice—ſo in the rule of four days, if notice is not given, the judgment will be set aſide as irregular.

Mr. Levy has ſworn expreſsly that the paper drawn up by him was intended to be preſented to Meſſrs. Pettit and Bayard for their ſignature ;—that Paſſmore ſo underſtood it, and that he told him it was null and void unleſs it had their ſignature. Without this, it was in fact, nothing more than a piece of blank paper.

What does Paſſmore do ? does he go according to rule ? does he go to Petit and Bayard with the new agreement ? No. He does juſt as much with reſpect to the award. He carefully keeps it out of the view of Petit and Bayard till he has gained his purpoſe. The irregularity of the firſt agreement was early diſcovered by Paſſmore, but without going to Meſſrs. Petit and Bayard as he ought to have done, and aſking them to ſign the new agreement, he proceeds to the office of the Prothonotary and there files it. He goes to Mr. Sampſon Levy's office. Mr. Levy is not at home. The young gentleman in the office, without adviſing with Mr Moſes Levy, confeſſes judgment, believing it to be regular and according to practice. Is this to be conſidered as the act of an attorney authoriſed to confeſs judgment? Is this to be conſidered as the act of Mr. Levy ? God forbid ! did Mr. Levy ever inform Paſſmore that he would be entitled to judgment on an agreement not ſigned by the parties ? Did he adviſe him to proceed in this way ? Not one word of this kind. He not only told him to go to Petit and Bayard and inform them by the firſt agreement there was no authority to chooſe an umpire, and requeſt them to ſign a ſecond, but he told him that without their ſignature the whole proceeding would be of no effect—that to obtain a judgment upon any report of an umpire, their ſignature was abſolutely neceſſary.

Let this fact never be forgotten, that at the moment of entering the report in the office, he knew that he could legally derive no benefit from it. Every defect was fully explained to him. After this explanation, why not go to Pettit and Bay-

ard, and inform them of the circumſtance. And further, why not go to the referees, and tell them openly and candidly, the ſtate of the caſe. Did he inform Meſſrs. Henry and Haſlett, of the defection in the agreement? No. Did he inform them, that through the inadvertency of Mr. Burd's clerk, he had got the rule of reference entered? No. But by the abuſe of the confidence repoſed in him by a young man, by the inadvertency of the clerk, in entering the rule, without referring to the original agreement, this man has accompliſhed his object,—and he goes on in this way. Sir, I aſk the Senate to give me credit for facts; I appeal to them, whether every ſyllable I have ſaid is not in full proof. No latitude, or freedom, is eſſential to this cauſe. The Senate will recollect what has been ſaid by Mr. Paſſmore in his teſtimony. Sir, I do not impute perjured, ſiniſter deſigns to any man, nor to any ſet of men. But I do moſt ſincerely think it a duty to ſhew, that in taking abſtract matter, there has been deception and colluſion. I ſay, that I do not impute ſiniſter deſigns to any man. As to what Mr. Henry has told us, that the idea which induced a modification of the original agreement aroſe from—and as to Mr. Paſſmore's ſtatement, that Mr. Yard had ſubſcribed for himſelf, and all the other underwriters, except Pettit and Bayard, after having declared, that "the veſſel was a vile, rotten ſhip, but if they'd give him a half per cent premium more, he would take a riſque in the veſſel," we muſt have our opinions. So far as reſpected Pettit and Bayard, we know that they did ſign for themſelves. I aſk for how many underwiters did Jas. Yard ſubſcribe? Did he ſubſcribe for one, or two, or more—and who were they? They are not named. I have not heard of any paying, but thoſe who ſigned. Thoſe ſubſcriptions of Mr. Yard, it ſeems, were not worth purſuing. Did James Yard ſubſcribe for Lyle, Crammond and Co. and Nicklin and Griffith? Yet thoſe are the perſons againſt whom the action was directed. Is there any teſtimony, that theſe gentlemen employed Mr. Yard to ſubſcribe for them? Not a ſyllable of this kind. Can it be true, that an half per cent additional premium, could be the motive for ſubſcribing on a rotten veſſel? No, ſir, a witneſs will be examined in the courſe of this trial, who will prove to you, that there were two agreements drawn up and formed, and made the ground of a ſecond action.

But, ſir, let me lead you one ſtep back to the ſituation of Paſſmore, before the referees, when he, by neglecting or refuſing to comply with the original agreement, was armed with an inſtrument, giving a right, which the parties never gave, whilſt the original agreement was indirectly kept hidden from the view of thoſe who were to determine the controverſy. The original agreement, acquieſced in by Pettit and Bayard, was never inſpected by the referees, nor by the umpire. I ap-

peal not to lawyers, but to men of buſineſs, to every man of common ſenſe, whether he would conſent to have a diſpute involving the ſum of five thouſand dollars ſettled in this way. Will any man pretend to ſay, that Pettit and Bayard were to be bound by a conſequent deciſion? Can an article of agreement, not ſigned by them, never conſented to, nor ſeen by them, be obligatory upon them?

It was firſt inſinuated, nay, more than inſinuated, that there was a ſpirit of procraſtination on the part of Meſſrs. Pettit and Bayard. But is not the fallacy of ſuch an inſinuation, clearly apparent. Meſſrs. Pettit and Bayard, inſtead of agreeing to a reference, might have carried it through the ſeveral Courts, and delayed payment for 2 or 3 years, nay, might have carried it into the High Court of Errors and Appeals, and kept Paſſmore out of his money, for perhaps ſeven years. But did Pettit and Bayard's conduct evince any thing like this, when, without any evaſion whatever, they agreed to ſubmit the matter to referees, and at a period, when, in conſequence of the yellow-fever, which exiſted both in 1801 and 1802, there would have been a general and a favorable relaxation from buſineſs. The referees held four meetings. Thoſe meetings are not delayed by Mr. Bayard. He was to have notice of the meetings, but he had not of all—though it has been ſtated, that he had the ſame opportunity of knowing when the meetings were to be held, as Mr. Paſſmore had. But how can this be poſſible, when Mr. Henry, one of the referees, was, during the whole of this time, an inmate at the houſe of Thomas Paſſmore. There was not, on the part of Mr. Bayard, a ſingle expreſſion of a wiſh to delay, except as to the papers from Shelburne, not being produced. On the 6th of Auguſt, where is the ſymptom of procraſtination on the part of Mr. Bayard? We are told that the referees had ſtated days and hours of meeting;—but are the referees to proceed in my abſence—perhaps detained by ſickneſs,—pleaſure,—buſineſs, muſt I be bound to attend, at the peril of having a report made againſt me?

Prior to the award being given, and at the laſt regular meeting at which Mr. Bayard attended, there was a diverſity of opinion, relative to the merits of the caſe; ſuch a diverſity indeed, that Mr. Bayard could have no reaſonable belief, that the referees would at all decide, much leſs had he cauſe to believe, that a meeting would be held, without his having notice, and that an award would be made againſt him a few days after, in conſequence of the unauthorized appointment of an umpire. But how was this diverſity of opinion reconciled? What was done? After having agreed to appoint an umpire, Mr. Ralſton was fixed on, and declined ſerving. When was the information of Mr. Ralſton's having declined, given to the referees? Not in

their uſual place of meeting, but in the common coffee-houſe. Was this a regular proceeding? Well, Mr. Ralſton cannot attend. What do they do? They then appoint Mr. Haſlett. I beg leave to ſtate, ſir, that I could have no objections to Mr. Haſlett, as an umpire, provided he had been regularly appointed. He is as honeſt a man, and as good a citizen, as any in the ſtate.

At what time the referees would take the ſteps, and aſcend to their room, muſt depend upon Mr. Haſlett, becauſe if Mr. Haſlett had ſent word that he could not attend, thoſe gentlemen could not have kept their heels. Where was Mr. Paſſmore all this time? Conſtantly attending, and extremely diligent. He ſeemed to have no other buſineſs. Mr. Bayard had avocations which required his particular attention. Yet if it had been convenient for him to attend, where was his notice of theſe proceedings, when judgment was in a moment to be given againſt him? Was he made acquainted with their meaſures? No. I aſk any gentlemen, if he can reconcile it with common juſtice, that in a caſe where five thouſand dollars was depending, he ſhould have ſentence paſſed upon him without a notice. I aſk, whether any man of common buſineſs would not have expected ſuch an arrangement, as that he ſhould be informed of the period when the deciſion was to be made. Yet did the referees go on, and hear Mr. Paſſmore read papers in the abſence of Mr. Bayard. No notice, whatever, of this is given to Mr. Bayard—none, in fact, was intended to be ſent. Would ſuch treatment be exerciſed even in a Court of Juſtice, looking for the due adminiſtration of juſtice?

Mr. Bayard, being in purſuit of ſome other object, by accident looked into the room where the referees had juſt retired to, and he was about to withdraw. He appeared ſurprized; for the expreſſion by Mr. Haſlett, of the word "*affected*," was not intended to mean any thing more, and I truſt we all underſtand it ſo, than that Mr. Bayard "*appeared*, not to have any previous knowledge of the meeting." What were the impreſſions of Mr. Bayard, may be deduced from his conduct on the occaſion. He did not appear to be in ſearch of the referees. After coming to the door, he is about to withdraw. He evinces no wiſh to enter the room—no knowledge of the buſineſs in which the gentlemen are engaged. On the contrary, when Mr. Henry calls to him, and informs him that they are employed on his buſineſs, what does Mr. Bayard ſay: "Why, Mr. Paſſmore, it is not right that you ſhould be here reading papers to the referees, in my abſence. Without any idea of the proceedings that had recently taken place, he ſat down and entered into a converſation with Mr. Paſſmore—and went into the merits of the caſe. There was nothing ſaid as to the ap-

pointment of an umpire, nor as to the other exparte proceedings. Mr. Bayard knew nothing of theſe circumſtances. Notice was neither given to him, nor intended to be given. We are to know nothing of colluſion in all this.

It is ſaid that Mr. Bayard by this act of ſitting down with the referees and entering into converſation on the ſubject has aſſented to the appointment of the umpire. But Mr. Bayard did not enter into a full ſtatement of his caſe, he produced no papers, he did not recognize the umpire, as ſuch, and certainly by his agreement he had never authoriſed the appointment of one. If there had been a diſpoſition on the part of Paſſmore to give notice of the imperfection of the firſt agreement, and and of the reaſons for drawing the latter, he would now, if not before, have produced the document and have ſhewn the variance. Mr. Bayard would have ſaid " if the agreement is defective, I ſhall take no advantage of it, let the referees give time for the receipt of the papers from Shelburne, and we will proceed regularly." But Paſſmore not only gave Mr. Bayard no notice, but he did not manifeſt a wiſh to do ſo. Mr. Haſlett, whoſe correctneſs of diſpoſition I ſtill acknowledge, if he had looked at all the papers muſt have ſeen the two rules and have diſcovered their variance, he never examined nor had an opportunity to examine, the Ship Carpenter, although his teſtimony had been conſidered of ſo much importance. Nothing but his affidavit was produced, and upon that affidavit of the Ship Carpenter, remarks had been made by Mr. Bayard, not one ſyllable of which did Mr. Haſlett hear of himſelf; and unleſs he was informed by the referees, he muſt have been totally unacquainted with the nature of the teſtimony. Now if the referees communicated every thing to the umpire, even upon oral as well as authentic information, ſtill is this inſufficient. Mr. Haſlett ought to have had a full and fair opportunity of examining all the teſtimony, to have enabled him to decide. When a man hears and ſees through his own organs he is enabled to judge—but not without. Well, Sir, here is one caſe in which no man of common underſtanding can fail to form a correct opinion. The proteſt, this loſt ſheep, this ſecond proteſt, is now in poſſeſſion of the three gentlemen. Mr. Shoemaker tells you how it got out of his hands. That it was withdrawn by Paſſmore three or four days after it had been lodged. Mr. Paſſmore tells the referees nothing of this circumſtance, but he had charged Mr. Bayard with having the paper. Who produced this loſt proteſt? Mr. Paſſmore? We have no evidence of this, but from the certainty that it was produced to the referees among the papers left upon the table. We know however that it was withdrawn by Paſſmore out of the hands of Mr. Shoemaker, it was then loſt, and again found for the purpoſe of repreſenting it to Mr. Haſlett, without his knowing whether, or not, Mr. Bayard had ever ſeen it.

All will allow, that no man ought to be condemned without a fair and impartial hearing. It is a rule in law that none shall be convicted without a hearing, nor upon teſtimony, without the opportunity of a croſs examination. Had Mr. Bayard an opportunity of examining the Ship-carpenter? This very eccentric man, Philips, (we all know him in Philadelphia) a very good, but eccentric man, he might have ſaid that he would as ſoon go in that veſſel as any veſſel in port. But I aſk the gentleman to read that proteſt and tell me if the account of the ſtate of her hull would juſtify the ſecond proteſt. If the accidental running foul of a hawſer would have made all theſe repairs neceſſary. I am not certain that the referees, or the umpire took the trouble of reading the two proteſts.

Suppoſe a man who reaſons differently from what I have done, ſhould ſay that it was proper for the referees to diſcard all forms of law. Is it not a very ſerious thing that a man ſhould be heard in his own cauſe, in the abſence of his adverſary? and is it not in evidence before you that Paſſmore was reading papers to the referees in the abſence of Mr. Bayard? Is it not in evidence before you that Mr. Bayard was not preſent when the Ship-carpenter was examined? Is it not in evidence before you that Mr. Haſlett declared that he had read the affidavit of Phillips? and did he conſider this alone as ſufficient? That hearing one party upon oath is ſufficient? According to this indulgence given to the referees a man might ſwear to all that was neceſſary to gain his purpoſe and the buſineſs would be fixed. In the name of Heaven will a latitude of this kind be given, and are referees to liſten to what Mr. Paſſmore chuſes to tell them that a mate and a cook told to him. This may all be right, ſir, in the minds of ſome people,—but common ſenſe and and common precedent forbid it.——But let us proceed further.

At the meeting in which Mr. Bayard accidentally found the referees engaged in the buſineſs—the laſt meeting which he had any opportunity of attending: At this meeting Mr. Bayard requeſted when he left the room, that the gentlemen would not come to a deciſion upon the caſe until he had an opportunity of getting the documents from Nova Scotia. I beg the Senate to take notice that Mr. Haſlett has ſtated that when the referees agreed to adjourn, he was "not certain whether it was to hear further ſtatements of the caſe, or to give him time to make up his mind." The referees however adjourn to meet on the enſuing Wedneſday. But no notice is given to Mr. Bayard of their meeting any more—not a particle of information on the ſubject. Now is this a fair, upright and regular mode of proceeding? Is this a way in which men of common ſenſe would act? Mr. Bayard when he made the propoſition ought at leaſt to have received an anſwer. He had

a right to place confidence in another opportunity of meeting the referees. He did not know but that he might have time to get the papers from Shelburne. But what is the event? Theſe gentlemen who are ſo punctual in all their buſineſs, don't meet at all, but at each others houſes!—in the country!—at Mr. Haſletts houſe in the country. Is this, ſir, a way of proceeding that any man of ſenſe would indulge or tolerate?

But the referees having made up the award in their out-door way, what is done with it? Who gets it into poſſeſſion? Does Mr. Bayard know any thing about it? No.—Not a ſyllable. It is ſigned in the country—Mr. Bayard knows nothing about it—Mr. Henry is at my houſe, and I am at the Prothonotary's.

When Mr. Paſſmore applies at the Prothonotary's office for an execution, he is told of the variance between the rules, of the irregularity of the proceeding, and that the judgment would not authorize the iſſuing of an execution. He is told of a variance which renders the whole proceeding of no effect. What does he do. Now gentlemen, fair play intends one courſe of conduct, foul play another. Fair play would have dictated ſuch conduct as an honeſt mind would conceive. Paſſmore would have ſaid I have got an irregular judgment againſt Mr. Bayard. I have got ſome time. If he is a candid man, I will go to him, and in order to purchaſe the price of a compromiſe, I will give him an opportunity of ridding himſelf of his embarraſſment. But, ſir, I aſk, what was the courſe of law? If an attorney had been applied to, would he have given Paſſmore advice to act as he did? Would he not have told him, that the rule muſt be ſtrictly purſued? Mr. Burd ſays, very properly, that there was no authority to grant an execution. It is on the report of Pearce and Henry, not of Henry and Haſlett, that my reſponſibility exiſts. I will not allow execution to iſſue, upon the terms of the laſt rule, becauſe it is at variance with the firſt, and particularly becauſe it is not authenticated by the ſignature of the parties. This is all ſound reaſoning. Mr Paſſmore hears it all, and what does he do? He then goes to Mr. Levy, we muſt ſuppoſe, becauſe there is a neceſſary ground for the inference. If he ſtated all the circumſtances to Mr Levy, it is my opinion, that my learned friend acted a little wrong. But Paſſmore never told him. If he had, the known practice, and ſound integrity of Mr. Levy, would have dictated a contrary rule of conduct. But Paſſmore did not tell him. He had heard that the referees had decided. He ſuppoſed that all was regular. He thought it was neceſſary, perhaps, to confeſs judgment, in order to give effect to the rule. Sir, if it had not been—[Here, Mr. Dallas was informed that it was not Mr. Levy who had confeſſed the judg-

ment]—I beg Mr. Levy's pardon. It was his clerk who confeſſed the judgment in his name. Mr. Levy has ſaid expreſsly, that if he had been at home, he never would have permitted the execution to iſſue upon the principle it did, and as a lawyer, I am ſure he would not.

Well, judgment is now confeſſed by attorney. Mr. Burd has but one mode of proceeding. All the reſponſibility reſts with the lawyer and not with him. He is all obedience, and he accordingly iſſues the execution, although at the ſame time declaring that it could have no effect. But what was the reaſon of all this haſte, of all this ſolicitude on the part of Mr. Paſſmore? Is he apprehenſive that he will not get his money according to the regular courſe of juſtice? Does he believe that Pettit and Bayard are not perfectly ſound and ſolvent. No, ſir, Paſſmore knew to the contrary. But very different conſiderations operated upon his mind. He has ſaid that his bankruptcy was in great part owing to the treatment he has received. But he knows that my official ſituation gave me an opportunity of knowing the nature of his misfortunes, and that they commenced before his original claim in this caſe.

Well, ſir, the execution is levied. What is to be done? A gentleman to whom he afterwards applied, informed him of the nullity of the execution. That it was, as will appear in teſtimony reſpecting the judgment by confeſſion, entirely an irregular proceeding. No notice was given to Pettit and Bayard. None is proved to have been given, and it appears that no notice except the irregular entered judgment is affected to be given. Mr. Paſſmore knows all this time that they ought to have notice.

The next thing in order is a letter from the counſel of Mr. Paſſmore to Meſſrs Pettit and Bayard dated the 31ſt of Auguſt, ſtating that the referees had made an award againſt them. This is the firſt legal communication. But I ask if this was a legal notice of the judgment? The candor of the counſel who gave this notice will cauſe him to acknowledge that there was no antecedent judgment according to law or known practice.

Now, ſir, we have the notice for the firſt time; but, we find, that this notice was not delivered till the 2d of September. But I do not mean to trouble the Senate with remarks on this part of the ſubject.

The exceptions are filed on the fourth of September. The Court met on the ſixth, when a motion was made to ſet aſide the execution. At this time, the terror of the yellow fever was beginning ſeriouſly to alarm the public mind. The mor-

tality made it neceſſary for the bar to look to their own ſafety, and it was propoſed to adjourn. On this ſixth day of September, when the parties were in Court upon the exceptions, Thomas Paſſmore had an opportunity of hearing all that was ſaid. His counſel deliberately, and upon a reflection coeval with the firſt notice of the irregularity of the proceeding, abandoned the execution, and ſtood upon the validity of the report. A rule was alſo obtained for taking depoſitions in the ſaid cauſe, in twenty-four hours notice. It was then that the counſel for Meſſrs. Pettit and Bayard aſked for liberty to argue on the report, the judgment and the exceptions. But there appeared to be prior buſineſs, and the determination of the Court was, that it ſhould be kept under adviſement, until the December term, when the arguments were to be heard. Paſſmore then well knew that the buſineſs was not at an end. That there muſt be a ſuit in Court; and if the ſubject is before the Court, publiſhing any thing to affect the deciſion of that Court, is a contempt. Thomas Paſſmore, notwithſtanding that he heard, and knew all theſe things, publiſhed his infamous libel, on the 8th of the ſame month, only two days after the rule was entered for taking depoſitions. It muſt have been clear to him, that the ſuit was not diſpenſed with. Either the judgment was to be affirmed, or ſet aſide. If it was to be affirmed, it would be a contempt. But, ſuppoſe it was to be ſet aſide, the publication would ſtill be a contempt, as it might operate upon the minds of thoſe whoſe taſk it was to decide. But it was equally clear that the exceptions were fatal to the report and judgment—the report, and the judgment muſt be ſet aſide, and the iſſue ſtands for a trial on the country,—by a jury. Here then you ſee the impropriety of bringing ſuch a thing before a jury, as the ſtatement, that one of the parties was a quibbling underwriter and on the very brink of bankruptcy. What man does not tremble at the conſequence!

Here, then, while the buſineſs was ſtill pending, did this infane, bewildered man, commit one of the greateſt outrages that ever was committed, and deviate from every thing that ought to have been the rule of his conduct. He tells you that he conſulted counſel, whether or not it could be conſtrued into a contempt. That he applied to Mr. Shoemaker the broker. This libel, which it is ſtated there was not time for any body to read, is read by Mr. Shoemaker. He reads it. He has no doubt of the matter. He tells him that it is a contempt of Court, having a tendency to prejudice a cauſe now depending in Court. He tells him of Oſwald's caſe—tells him to go, look into the book, and take advice. Paſſmore ſays, "Oh, I've taken better advice than you can give me. I've conſulted my lawyer."

It appears however that this paper, which had only been up for one moment, this paper that Mr. Kitchen had pulled down

immediately, had been read by every viſitor at the Coffee-Houſe. It appears at the Inſurance Office. It is read there. Paſſmore himſelf produced it to Mr. Heneſſey the Clerk in Mr. Burd's office. Mr. Brown alſo reads it. I aſk the Senate if ever any party, if ever any man committed ſo foul and bad an act calculated to ſtab the feelings of an innocent and reputable man.

Now, ſir, Paſſmore chuſing to reſt upon his own wiſhes—chooſing to reſt upon the opinion of the young gentleman in Mr. Levy's office, he goes to the Coffee-Houſe and poſts this infamous bill. What is that paper? I do not believe, ſir, that the Engliſh language can furniſh more ſcurrility—nor that the darkeſt and moſt corrupt heart could furniſh any thing more more baſe nor more cruel. Who was the perſon that was aſſailed? A citizen of Philadelphia, whoſe anceſtors as well as himſelf had always been eſteemed and reſpected and who had lived without reproach. This is the man libelled in open daylight in the fouleſt and blackeſt language. I do not know, ſir, that a man who never ſaw Mr. Bayard—I do not know ſir that a man who hates Mr. Bayard would feel for his ſituation and deprecate the conduct of Paſſmore.

But what muſt be the feelings of Mr. Bayard's family? What muſt be the effect upon his children?—The child ſees not only enough to forfeit his future hopes, but ſees the father in a ſtate of inſolvency—reduced to the very brink of deſtruction.

And where was this done. At the merchant's coffee-houſe,—a public place for commercial buſineſs, where he might meet creditors, who might be prejudiced, by charges ſo boldly and ſo openly made. Here it was that he was to meet the public eye, as a perjured, quibbling underwriter, whoſe ſolvency was to be inſured by a policy of two and an half per cent. I aſk, ſir, whether any man can put his finger upon an outrage commenſurate with this. To ſay that Mr. Bayard had taken a falſe oath, with an intention to procraſtinate. Is ſuch conduct juſtifiable? Even ſuppoſing for a moment, that, (which was not the caſe) that Mr. Bayard's ſole object was delay—was that a ſufficient cauſe for ſo flagrant an outrage on the part of Paſſmore? When I make theſe commentaries, ſir, I do it with the intention of diſmiſſing this part of the ſubject. But they are due to Mr. Bayard. Rather, ſir, would an honorable man fall by the poignard of the aſſaſſin, than to receive ſuch a ſtroke as this, with his young family about him. But this, ſir, was not only done at the coffee-houſe, where it furniſhed food for ſlander, but it furniſhed chit chat for every circle of ſociety—ſo much ſo, I believe, that there was ſcarcely any ſquare in Philadel-

phia, that had not ſome trumpery on the ſubject. Not only from Mr. Kitchen, was it heard, but from every merchant in the city, it might have been had,—not only was it circulated through the city, but in the neighborhood of that coffee-houſe lives his aged and reſpected father-in-law, who muſt have heard it,—and what muſt have been his feelings!

As I before ſtated, the argument on the legality or illegality of the judgment was poſtponed. The ſubject was kept under adviſement until the ſucceeding Court. Mr. Bayard was certainly to have his rights protected. He was charged alſo with the rights of his friends. He was to take charge that this ſhould not blaſt his credit. What was to be done? The law provides three remedies in ſuch caſes. The firſt is a ſummary proceſs, by puniſhing the man who has endeavored to obſtruct the current of juſtice. The ſecond is by indictment—and the third by a civil action for damages. Now, ſir, not only theſe three remedies are given, but they are all according to law, and may all be appealed to at the ſame time.

This gentleman thus oppreſſed with a load of obloquy had his choice of the three remedies, or of applying to all of them. But what will his friends the other underwriters who are concerned in the fate of the firſt action ſay? They might ſay "you may be willing to proſecute by indictment, to bring your action for damages or to bring none at all. But we ſay that the prejudice will have an effect upon the action in which we are concerned. The remedy muſt be ſought for where it has a connection. You muſt ſtep forward immediately to the ſame Court wherein our buſineſs is under adviſement." What does Mr. Bayard do? He ſays if I bring this man to the Court, I give him an opportunity of doing away the obſtacle that he has thrown in the way of juſtice. I am not afraid of my reputation, provided I have an opportunity of proving my innocence. I will not innovate on the rights of others, therefore without taking the vindictive (as it may be called) principle of indictment—without bringing an action for damages which at moſt would yield but a very ſolitary ſatisfaction for the ſtain of character,—he takes the beſt and moſt rational mode of proceedure. I ſpeak, ſir, now, in preface to the principle of ſummary proceeding, and I do moſt ſolemnly ſay that if this proceſs for contempt was not the law— if this proceſs is not recognized and permitted, it is not long that we ſhall find the trial by jury proceeding in a ſerviceable way.

With all the deference that I feel for the Committee of Grievances, and for the honorable Houſe of Repreſentatives, I muſt ſay that they do not ſeem to have conſidered a part of this ſubject properly, when they ſay that the libel bore no direct

alluſion to a cauſe pending before the Court. Sir, if we aſk what that paper does refer to, it will be impoſſible to be miſtaken reſpecting it. The expreſſion is uſed in relation to the ſubject. Now what is the ſubject? The action pending between Thomas Paſſmore and Pettit and Bayard. Does not Paſſmore in his libel expreſsly ſay that the affidavit taken before Mr. Inſkeep had the effect of keeping him out of his money three months longer; and, let gentlemen look at that affidavit and ſee if it does not immediately relate to a ſuit then pending. Yes, ſir, and ſtill pending. It is a rule of law that whatever can be rendered certain muſt be ſo rendered. Unleſs with his own eyes and his own ears he has ſeen and heard, it is not to be expected that he ſhall give poſitive teſtimony. Well, now the ſubject was whether the publication referred to the buſineſs before the Court. Mr. Bayard ſwears poſitively that he had no ſuit or controverſy whatever with Thomas Paſſmore, except the ſuit then depending in Court. What does Paſſmore do before that Court? Now even upon the record it appears that in his ſubſequent anſwers to the interrogatories drawn up by Mr. Levy, he did not pretend to ſay that there was any other ſuit. He even refers to this action, but avails himſelf of a legal ſubtlety, namely, that becauſe judgment was entered, he believes that there was no ſuit depending at that time. Now what are the Court to do? Are they to ſay that becauſe Mr. Paſſmore ſaid he thought there was no ſuit depending, there was no ground for proceeding againſt him? In the law of the land Mr. Bayard was entitled to the remedy, and the Court could not refuſe it. The contempt was ſhewn to the ſatisfaction of the Court, and even acknowledged. Paſſmore has acknowledged that he had not any controverſy with Mr. Bayard but what aroſe out of the cauſe then depending. There could be no heſitation on the part of the Court, to do juſtice to Mr. Bayard. Such is the rigor, the neceſſary rigor of the law, that they ſhould not have poſtponed a deciſion on the rule to ſhew cauſe why an attachment ſhould not iſſue. But the mortality of the yellow fever and its conſequent alarm cauſed an indulgence to Paſſmore until the December term. Sir, it is evident that the conduct of the judges in every ſtage of this buſineſs has been tempered with indulgence and mercy. There can be no queſtion but that the judges fully expected that Paſſmore would before the December term take ſome ſteps to repair the injury that he had done. Upon Thomas Paſſmore's coming into Court in December term it was fully expected. I performed my duty on that occaſion, by calling for the record, and by reading the ground of the affidavit. I then appealed to the charge of the publication of the paper, ſubſcribed by Paſſmore. As there were no denial of this, nothing remained on my part to do, but to move for the attachment. If Mr. Paſſmore, or his counſel, wiſhed to reſort to interrogato-

ries, it was their buſineſs to move for them, and not mine. It is his privilege—it is his benefit to aſk for them. If he did anſwer to interrogatories, it would be in the face of the Court, and of all the world. His conſcience would not only be at hazard, but if he perjured himſelf, he was ſubject to a proſecution for it. My repreſentations to the Court having clearly eſtabliſhed the contempt, the Chief Juſtice was about to addreſs Thomas Paſſmore. And, now, ſir, the evidence bears upon my narrative. Then it was that Mr. Levy roſe and hoped that we ſhould proceed in the uſual way, by filing interrogatories. Then, ſir, it was that there appeared a diverſity of opinion between the counſel on the different ſides of the queſtion. Some ſaying that it was our duty to furniſh interrogatories, and others denying the poſition directly—that it was not our duty to furniſh the interrogatories, unleſs the party chooſed to call for them himſelf. Mr. Levy inſiſted that we ſhould exhibit them without the call. Then it was that I put into his hands a book, containing a caſe which I thought was inconteſtibly and decidedly in point. The Court, however, decided that interrogatories ſhould be filed. I drew up the interrogatories according to my idea of the previous circumſtances and the merits of the caſe. It eventually appeared clear and ſatisfactory to the Court that nothing in the anſwers went to purge the contempt. In fact, Paſſmore had admitted in unequivocal terms, that he publiſhed this libel,—that he publiſhed it of Pettit and Bayard,—with the exception of a legal ſubtlety.

Sir, I am ſorry for the diſtreſs of a witneſs who has told us that he thought the judges appeared very ſevere and rude in their interruptions—but it is a conſolatory reflection that the expoſition of this is dependent on the teſtimony of a ſingle witneſs, who has been conſidered by Mr. Ludlam as a volunteer in the buſineſs. I think ſir that this part of the proceeding is an exemplification of the correctneſs of the conduct of the judges—When Judge Smith replied to Paſſmore that he was adding inſult to injury, the fact of the contempt had been confeſſed and judgment had paſſed.—Was this a time for Mr. Paſſmore to ſay that he conſidered himſelf as the injured perſon, and Mr. Bayard as the aggreſſor? Was not this ſir adding inſult to injury? and I aſk if a perſon was to perſevere in ſaying as Paſſmore did, after the fact had been confeſſed, whether his conduct could be termed any thing leſs than inſult? After ſentence is paſſed he begins to parley with the Court—and was it improper or rude in Judge Yeates in this caſe to ſay "ſentence is paſſed—we cannot hear you ſir."

But, in relation to the Chief Juſtice, who is of courſe the organ of the Court. Sir, I ſtill feel for the different medium through which the committee of grievances and the honorable

Houſe of Repreſentatives have viewed this ſubject. That benevolence ſhould be conſidered as a crime! The Chief Juſtice ſays, in ſubſtance to Mr. Paſſmore.—You are now in contempt, and in conſequence of that ſituation, it is our duty to puniſh you, or ſee that juſtice is done to the injured gentlemen. The libel is enormous—ſome reparation is due to their characters, and to ourſelves. To be ſure, ſo far as reſpects ourſelves, we are not ſo fooliſh as to believe that there is any thing perſonal. But that is not ſufficient for the purpoſe. You have interfered with the due adminiſtration of juſtice. You may be one of our beſt friends, but we cannot let you eſcape."

Is it not clearly apparent, ſir, that the injury conſiſts in ſaying out of Court any thing that may affect the deciſion of the Court or Jury? I recollect that on the firſt trial of Fries, for high treaſon, after the Jury were empanneled, publications appeared in the newſpapers calculated to influence the minds of the Jury and the counſel. Inſinuations and even threats were publickly thrown out. I aſk this Court, ſir, if by ſuch publications the priſoner had been deprived of the full ſcope of our talents, however indifferent they might have been, what would have been the conſequence?

Unleſs Courts can proceed without any interference of this kind, unleſs they can be kept perfectly independent of attempts to bias or affect their proceedings, and unleſs they have the power of puniſhing ſuch attempts, the jury trial muſt be laid proſtrate and there is an end to the fair and impartial adminiſtration of law and juſtice. Theſe were the impreſſions, and conſequently the oſtenſible objects of the Chief Juſtice were to prevent the repitition of ſuch injuries. He therefore ſays to Paſſmore "you are to underſtand that your conduct is calculated to produce an effect on the public mind before the thing is decided by us. I don't mean that you could bias our opinions,nor do I ſay that you have given us any direct perſonal inſult. But you have endeavoured to prepoſſeſs the public mind."

I think it was mentioned ſir,(and now I am anticipating the argument) I think that one perſon in his teſtimony relative to the expreſſions of the Court, coupled the names of Pettit & Bayard with the word atonement. Now even for the ſake of argument ſuppoſing that the Chief Juſtice told Paſſmore expreſsly that he was to make an atonement to Meſſrs. Pettit and Bayard.—if that atonement would have repaired the injury, where could have been the wrong? "You have inſulted Pettit and Bayard perſonally—you have accuſed them of keeping you out of your money—to which you ſay you were fairly entitled, and the action is ſtill pending—you have accuſed Mr. Bayard of perjury, and that ſingle accuſation is an obſtruction of juſtice. Notwithſtanding this our object is not to puniſh you with fine

and impriſonment, it is merely to render juſtice to the injured party.——If you recant your expreſſions ſo far as reſpects Meſſrs. Pettit and Bayard, the effect will be done away—you will then reſtore juſtice to its regular courſe—our attachment being met by your recantation."

The Judge then ſays, in the firſt inſtance, after the anſwers to the interrogatories are given—"Mr. Paſſmore, you have been guilty of an enormous libel, againſt the characters of Meſſrs. Pettit and Bayard, which certainly requires atonement. We recommend to you, to take meaſures for this purpoſe." Was not this language of the Chief Juſtice, like that of a gentleman? And, I'm ſure he is a gentleman, in recommending ſuch conduct to an offender, in a benevolent manner, and with a view to avert the neceſſity of paſſing a judgment, which, however, it might diſagree with his feelings, would become abſolutely neceſſary for the regular adminiſtration of juſtice. If even he was wrong, as a lawyer, I aſk where is the wrong as a chriſtian? The ſyſtem of our laws will ſhew that there is no puniſhment where an attention to redreſs of the injured perſon is not conſidered. The redreſs of the injury, is an indiſpenſable appendage of law and juſtice.

It is not to be ſuppoſed, ſir, that the atonement in the preſent caſe was to be one of that kind, which are ſo common in trifling caſes—not "I beg your pardon, ſir." It muſt have been ſuch an apology as would have anſwered the purpoſe for which it was intended. It muſt have met the occaſion. It muſt have been by a direct denial of the aſſertions contained in the libel. He might have ſaid, "it is true, I have aſſerted theſe things of Meſſrs. Pettit and Bayard,—but I was miſtaken. Since that, information has met my mind, by which I am convinced that I have done injuſtice to thoſe gentlemen. What I have aſſerted, is untrue." Here, ſir, would have been ſomething like a remedy for the injury. The man is ſorry for his offence. The recantation meets the occaſion.

But, ſir, it is among the wanton conduct of this man, that through the whole courſe of this buſineſs, advice has had no effect upon him. Not one word could be obtained from him to do away the effect of this ſcandalous libel. Yes, as to Mr. Pettit, "O, I agree ſo far as reſpects Mr. Pettit. I am ſorry for that. But as to Mr. Bayard, (againſt whom the material injury was directed,) not one word. I will not retract, nor apologize. He has been the aggreſſor—I am the injured man." Worſe and worſe.

What were the Judges to do in this caſe, if they meant to act an upright and independent part? They proceeded as they

ought to have done, and pronounced judgment. But, ſays Mr. Henry, they were rude Judges. I ſay, they were benevolent Judges. Let us look to their conduct, and we ſhall find them to have been ſo. We are accuſtomed to the old proverb, "actions ſpeak more than words." When Paſſmore wanted a room in the debtor's apartment, it was immediately granted. When he aſked for permiſſion to viſit his family, it was immediately conceded. This, ſir, is a kind of indulgence not commonly granted. The learned counſel will be able to ſay, that this was a mark of condeſcenſion more calculated to produce a repetition of the offence, than to ſuppreſs it. I won't deſcant upon that ſubject. I hope it will not be incorporated in the articles of impeachment.

Here, ſir, is a ſhort hiſtory of this buſineſs. I have endeavored to confine myſelf to the mere facts. We ſhall proceed to hear the teſtimony in favor of the venerable gentlemen who are accuſed; after which, it will be my duty to take a general view of the ſubject, and to ſhew,

1ſt. That the Supreme Court has a general power to puniſh contempts.

2d. That the caſe of Thomas Paſſmore, was a caſe of contempt, proper for the exerciſe of that power; and

3d. That in the manner of the Court, and in the degree of puniſhment, ſo far from there being any thing like rude, or arbitrary conduct, there was only too much indulgence, in the manner of puniſhing an offence of this kind.

Adjourned until 10 o'clock on Monday morning.

MONDAY, January 14, 1805.

Mr. DALLAS. Mr. Speaker, and gentlemen of the Senate. On Saturday, I had the honor of ſtating the grounds of the argument, in which the ſubject would ultimately be placed before you. Let me, however, before we proceed to examine the witneſſes, ſolicit your attention a few moments, until I correct an error that has been imputed to me. It is ſtated that I ſaid. that Mr. Shoemaker ſaw the paper before Paſſmore put it up. If I did ſay ſo, I was wrong. But it is of no conſequence, becauſe, although he did not ſee it, yet he knew the nature of it, informed Paſſmore of the conſequences, in words that could not be miſunderſtood, and endeavored to prevail on him not to put it up.

If, ſir, I erred in one inſtance, I erred in another. I think I did not in ſufficient terms, explain the conduct of Paſſmore, after the award had been given in. When Shoemaker and Berrett, impreſſed with an idea that the award, and its attendant proceedings had been proper, drew up the order at Paſſmore's requeſt. Shoemaker at this time ſaid, that Pettit and Bayard, being the neareſt, as well as the firſt named in the rule of reference ought to be preſented firſt with the order. The other underwriters had no immediate agency whatever in the buſineſs. They truſted all to Mr. Bayard. They were to be bound by the report, on ſeeing the order ſigned by Mr. Bayard. It therefore would have been an act of propriety and duty, to have preſented the order firſt to Pettit and Bayard. But, no, ſir, it was the expreſs deſire that it ſhould be preſented to them laſt—that it ſhould have the ſignatures of all the other underwriters before it was ſhewn to Pettit and Bayard. I ſay, ſir, that I have not in ſufficient terms explained this part of Mr. Paſſmore's conduct. But, ſir, the ſame ſpirit that before actuated me to get rid of all the chaff of the tranſaction, prevents me now from enlarging on this.

Mr. Henry has been again brought into view of the Court. It appeared to me that he had completely ſworn all that he knew of the tranſaction. It ſeems, however, that he has found out ſomething elſe; but with what view it has been brought before the Court, I am at a loſs to determine. What Mr. Dallas ſaid to Mr. Henry outſide of the bar of the Court? Is this, ſir, a proper kind of teſtimony to introduce? And, even if it was, is it not plain from the circumſtances, and the manner of expreſſion, that what Mr. Dallas ſaid, was mere jeſt? Such teſtimony, I think the worthy manager did not know, but the honorable counſel might have known, that this kind of teſtimony would not have been allowed even on the trial of a negro wench for ſtealing her miſtreſs's thimble.

In the face of my country and of my God, I ſaid then, as I ſay now, that Thomas Paſſmore ought to be laid upon his back. They have therefore not only the prittle-prattle of private converſation, but they have my ſolemn avowal. Were we to be furniſhed with the many converſations of a certain tavern, which I could name in the city of Philadelphia, relative to the Judges, and to the elections of Governor and Sheriff, they would furniſh as much light upon the ſubject as the wrangle between Mr. Levy and Mr. Dallas.

And are the eyes of Mr. Paſſmore caſt high in the air for the diſtreſs of this ſituation? If, ſir, the conviction had been for 40,000 dollars damages, inſtead of fifty dollars, it would have been immaterial, as to its conſequences, except that it might prove the prelude to his fortune, as the preſent has proved a ſource of profit. I think the gentleman may eſteem contempts

as very valuable things. There ſhould always be a room to accomodate libellers with, or according to the witneſs, with Mr. Duane's apartment.

I wiſh Mr. Henry health and joy of his friend. I wiſh Mr. Paſſmore long life and happineſs, and joy of his friend, gueſt, inmate, bail, witneſs, volunteer witneſs, and I pray the honorable Senate to recollect that except as to the teſtimony of Mr. Paſſmore and his volunteer friend, the buſineſs requires very little elucidation. When the witneſſes are called, they will teſtify as to the truth of my ſtatement. Let them be heard with impartiality. I am ſure they will be heard with impartiality,—and I will be heard in ſupport of the fair and upright conduct of the Judges.

Moses Levy, Esq.—sworn.

I was not, may it pleaſe this honorable Court, employed by the proſecutor Mr. Paſſmore, in the controverſy which gives birth to the preſent enquiry: the action had been commenced by my brother, who was originally concerned for Thomas Paſſmore, as his counſel. On the twenty-fourth day of Auguſt 1802, Thomas Paſſmore called on me, and informed me of his having entered into an amicable action with Meſſrs. Pettit & Bayard, and of the meaſures that had been taken by him in conſequence of it. I enquired of him into all thoſe facts and particulars that would enable me to underſtand the cauſe and act in the beſt manner for his intereſt. I ſaw all his papers and heard his ſtory, from which I found that two amicable actions had been inſtituted, in the Supreme Court of Pennſylvania, in which he was plaintiff, on a policy of inſurance on the brig Minerva, underwritten by Meſſrs. Pettit and Bayard, William Crammond for Philips Crammond & Co., James Lyle, Nicklin & Griffith and James Yard.

The firſt of them was a ſpecific action againſt Pettit & Bayard, No. 264 on the docket, and returnable to September term 1802; the next was a kind of general action upon the docket, not very regularly ſtated, againſt Mr. James Lyle, Meſſrs. Phillips, Crammond, & Co. and Meſſrs. Nicklin & Griffith; this, as well as I recollect, and according to the notes I have made of the buſineſs was No. 289, alſo returnable to September term 1802. In the firſt action, againſt Meſſrs. Pettit and Bayard, an agreement was filed, ſubſcribed by all the underwriters, in which all the parties were included, and all the matters in variance were ſubmitted to Hugh Henry and Matthew Pearce, and upon their report judgment was to be entered in favor of the ſucceſsful party. In this agreement no power was given to chooſe an umpire if the referees ſhould differ in opinion. But on the back of this agreement, there was a writing drawn up by Mr. Sampſon Levy; this draft of an additional agreement was not ſigned by any perſon, but the attor-

ney for the plaintiff, and it varied the agreement in this point, that it entitled the referees to chooſe an umpire in caſe they diſagreed, which was not contained in the firſt agreement. This was never ſigned by either of the defendants tho' the plaintiff's attorney muſt have drawn it up with that view; of courſe as it could not be valid without the ſignatures of both parties, I conſidered it as a mere nullity; in conſequence of which the original agreement ſubſiſted in full force, and there was in all that agreement no authority to chooſe an umpire. The firſt agreement was dated the twelfth of July, 1802, and, I believe, was filed on the 13th of the ſame month. After this, Thomas Paſſmore, on the 17th of July 1803, (I think it was) got a new agreement drawn up by Mr. Sampſon Levy, to be ſigned by all the other underwriters except Meſſrs. Pettit and Bayard; by this ſecond agreement, ſigned by Meſſrs. Nicklin & Griffith, Mr. James Lyle, Meſſrs Phillips, Crammond & Co. the three underwriters that I have mentioned, (without Mr. Yard) agreed to ſubmit all matters in diſpute to Mr. Pearce and Mr. Henry, with power to chooſe an umpire in caſe they could not agree. In this ſituation facts ſtood when application was made to me. The report was filed on the 6th of Auguſt 1802, and by that report awards were given diſtinctly againſt all the underwriters (except James Yard, who was not a party to the ſubmiſſion) for the amount of their reſpective ſubſcriptions, particularly that of Meſſrs. Pettit and Bayard for about 490 dollars. On the 18th of Auguſt, judgment was entered by Mr. Peter Brown, acting for Sampſon Levy, the plaintiff's attorney; and execution iſſued on the 19th againſt Pettit and Bayard, which was immediately levied on their houſehold furniture. On the ſame day, Mr. Ingerſoll, acting as the counſel of Meſſrs. Pettit and Bayard, wrote a letter to the Sheriff, informing him that the execution was irregular and requeſting him to ſtay further proceedings. Before the 24th of Auguſt 1802, Thomas Paſſmore had been to ſee Mr. Burd, was apprized of the exception taken, that the report againſt Pettit and Bayard not having been made in conformity to the ſubmiſſion, the report was made by Hugh Henry and William Haſlett, whereas Pettit and Bayard had ſubmitted their diſpute to Hugh Henry and Matthew Pearce. On this he applied to me, and gave me a fee proportioned to the difficulty of the caſe. I do not recollect any thing further of what paſſed betwen us at that time. After he had been thus informed I had two pretty full converſations with Mr. Paſſmore on the 24th and 31ſt of Auguſt, at my ſeat in the country. He was perfectly informed of the objections againſt the execution and of the invalidity of the report, the judgment and the execution; I had even heard of their irregularity before, as the circumſtance was mentioned to me by the young gentleman Mr. Brown who was reading law with my brother, and

in his abſence (he had been for ſome time on a jaunt in New-Jerſey) had frequently applied to me for inſtructions how to act, in caſes that were in any degree complicated. I might have told Thomas Paſſmore, that to the beſt of my judgment and to the utmost of my power, I would ſupport his intereſts in the buſineſs; but I ſolemnly declare, that I never did ſay nor even did think that either that judgment or execution againſt Pettit and Bayard could be ſupported. In my converſation with Paſſmore, on the 31st of Auguſt, 1802, it was unavoidable, I could not act in any other way than to aſk him, "can you give proof that you ſerved this notice of the award on Meſſrs. Pettit and Bayard. The utmoſt confidence appeared to ſubſiſt between us. I told him that although he ſaid that notice had been given to Meſſrs. Pettit and Bayard, the judgment and execution muſt fall to the ground as irregular and void, unleſs he could prove by ſome diſintereſted witneſs that notice had been ſerved. On ſome further converſation he was ſatisfied that he could not prove that notice had been ſerved on Pettit and Bayard, for on the 31ſt of Auguſt I drew up a notice to them that the award had been given. This notice was not ſerved by me; I do not do the out door buſineſs of my clients; it was given to Mr. Paſſmore—he knew its contents, and he ſerved it, I believe, himſelf on Meſſrs. Pettit and Bayard. I recollect that I told him I thought that as the judgment muſt be given up, the ſooner it was done the better; that I ſuppoſed it would be for his intereſt to do ſo. With a perfect underſtanding between us that as he could not prove that notice had been given, this notice was drawn up. I ſtated to him that the judgment was of no conſequence, as it could not be ſupported and it was immaterial whether it was given up or not as we could ſpeedily obtain a new judgment and execution if the award was regular and would bear inveſtigation; that giving up the judgment was a mere matter of moonſhine, and of no conſequence, as it could not affect his claim. This notice was ſerved on the 2nd of September; on the 4th of September, 1802, exceptions were filed againſt the award, entered in this cauſe. Thoſe exceptions did not ſuggeſt the fatal irregularity apparent on the face of the report. Mr. Paſſmore had obtained from Mr. Ripley, a clerk to Mr. Burd the Prothonotary of the Supreme Court from ſome momentary inattention or inadvertance of his, a rule of Court ſtating that Pettit and Bayard had agreed to ſubmit their controverſy to an umpire. I took from him all facts that tended to ſupport that irregularity. In our ſecond converſation he was apprized of the nullity of the award and judgment, and of the fatal irregularity in the proceeding. That the rule of Court made out by the clerk, ſtating that Pettit and Bayard had agreed to abide by the award of an umpire was not warranted by the original agreement, was a mere miſtake and

therefore could be of any uſe to us. I ſtated to him that among the moſt material facts and circumſtances that had weight with me, was that he had not ſerved a notice on Meſſrs. Pettit and Bayard ; I requeſted him to give up the execution as it could only be bolſtered up by circumſtances, that would be over-ruled by the irregularity of the whole proceeding. I thought at that time that Mr. Paſſmore was one of thoſe clients, who when his counſel feels himſelf obliged to tell him what may not be agreeable, though it may be abſolutely neceſſary, would not cenſure him for it, or ſuſpect his integrity. It was under theſe impreſſions of Mr. Paſſmore, and ſuppoſing him to be a man of underſtanding, who would readily believe that I was very anxious for his intereſt when I ſtated to him at large the neceſſity of giving up the execution. It was not long after that, before I had loſt his confidence by my candor. The court met on the 6th of September. 1802, and ſat but two days, as the yellow-fever prevailed in Philadelphia; they adjourned from the 6th to the 18th of September. On the 6th of September, 1802, a motion was made by Mr. Joſeph B. M'Kean to have the execution ſet aſide. Exceptions had been filed againſt the award , I had had time to examine the proceedings, and there appeared againſt the execution ſeveral fatal defects in point of law ; one was that it had been iſſued upon a report filed in vacation, before any notice had been given, to the defendants of that report. The principles of law, as well as of ſound reaſon require, that when referees make an award it cannot be binding or acted upon until notice has been given of it to the party againſt whom it is to operate, ſo that if they have any juſt exception againſt it, they may ſtate it to the Court, who upon ſatisfactory evidence being laid before them of the truth or juſtice of ſuch exception, will quaſh and annul the report.

This had not been done ; at the ſame time there was another objection to the execution equally weighty. The action was entered on the 12th of July, 1802, as of September term, 1802 ; the rules of law require, that there ſhall be a courſe and ſeries of orderly proceeding in the conduct and management of a ſuit at law, the writ muſt precede the declaration ; both of them the trial ; the judgment muſt be after the commencement of the ſuit ; inſtead of this, the judgment and execution were dated before any ſuit was inſtituted ; the execution bore teſte 27th March, 1802. An execution ſo groſsly defective, I muſt confeſs, I did not think myſelf juſtified in attempting to ſupport. I did not, I muſt confeſs, attempt to ſupport it, on account of my deference to the Court, whom I would not inſult ſo much as to attempt to ſuſtain before them, an execution ſo totally devoid of every legal foundation to ſupport it. Mr. Paſſmore did not requeſt it. If he had, a ſerious compliance on my part with his requeſt, would have ſhewed that I knew no more of law,

than I do of ſoldering a tin kitchen, or mending a tea-kettle. I looked upon myſelf as a better judge of ſuch queſtions than Thomas Paſſmore. He had perfect confidence in me at that time; he wiſhed the execution to be ſupported—ſo did I—and it was his intereſt that it ſhould be ſupported; but as I could not do it conſiſtently with my regard for my reputation as a lawyer, nor with the moſt diſtant proſpect of ſucceſs, I gave it up on the 6th of September, 1802, leaving the queſtion to be argued on the award. Notwithſtanding Mr. Paſſmore expreſſed ſome regret at my giving up the execution ſo readily, he did at that time, and for a conſiderable time afterwards, (which his letters will ſhew) place the moſt unlimited confidence in me, or at leaſt affected to do ſo; I was never treated with more reſpect by any client, than I was by Mr. Paſſmore, in his letters to me. I thought I was acting with laudable attention to for his intereſt, when, in a time of great mortality, I took a rule for taking teſtimony in writing, to enable me to ſuſtain the award and judgment; the rule was got; my reſolution was never broke by reflecting on my perſonal danger, or the riſk and trouble that I ſhould experience in the examination of his witneſſes at ſuch a time, leaſt they ſhould be loſt by the contagion then ravaging. On the 8th of September, 1802, two days after this, Mr. Paſſmore paſted up at the coffee-houſe, the paper for which he was afterwards proſecuted: On the 18th of September, 1802, Mr. Dallas came into Court, and brought the paper, with Mr. Kitchen and Mr. Bayard's depoſitions; he aſked for a rule to ſhew cauſe why an attachment ſhould not iſſue againſt Thomas Paſſmore, for a contempt of Court; the publication and depoſitions were produced to the Court, and they granted the rule, which was made returnable to the next term. The Court met on the 8th of December, 1802; I appeared in behalf of Thomas Paſſmore, and in the mean time, I had received a new application and a new retainer from him; I appeared in Court, and endeavored to ſhew that this paper was not of itſelf ſufficient to conſtitute a contempt of Court, as it had no relation to a cauſe that was to be tried by a jury, that the diſpute it related to was to be ſettled by the Judges alone, and that the ſame danger was not to be apprehended from the Judges, from publications of this nature; I ſaid, however uninformed men might be led aſtray by irregularities of this kind, that the Court would decide upon the merits of the caſe, and pay no attention to inflammatory publications made out of doors; as they had nothing to hope or fear from the favors or prejudices of any individual, which was not the caſe with a jury; and that this caſe was to be decided by the Judges of the Court alone, who had no reaſon to miſtruſt themſelves. I produced ſeveral caſes from the Chancery books, and a variety of other caſes in ſupport of my poſition, in which the chancellor had decided agreeably to the doctrine I contended for. On

the other hand, the counſel for the proſecution contended, that the publication alluded to an affidavit of Mr. Bayard, taken before Mr. Inſkeep, as it ſaid that he had ſwore to that which was not true, and that the caſes I had cited did not apply; and concluded by obſerving that as it related to a ſuit depending in Court it neceſſarily followed that it amounted to a contempt. After a patient and attentive hearing of all the arguments on both ſides, the Court were of opinion that it was a contempt, and therefore ordered the attachment to be made abſolute. The counſel for the proſecution contended that as it was a ſummary proceeding, and there was ſufficient proof of his having made the publication, all that was requiſite for Mr. Paſſmore to do, was to acknowledge the fact and receive ſentence at once; this I was oppoſed to, and obſerved that the law that gave the Court the power of puniſhing, was checked by another proviſion, which gave the accuſed party an opportunity to acquit himſelf by his own oath—that if interrogatories were filed, and anſwers made to them on oath, from the face of which it appears that he did not commit the contempt, then no teſtimony of other perſons however ſtrong was of any effect; though if the party accuſed ſwears falſely he may be proſecuted for perjury. The Court was of the ſame opinion and agreed that the interrogatories ſhould be filed. Mr. Paſſmore was held under a recognizance of 300 dollars and found ſurety for another 300 dollars for his appearance to anſwer to the interrogatories. Hugh Henry was his ſurety. The interrogatories were ſhewn to me, to draw up the anſwers to them. I drew thoſe anſwers, as they have been exhibited before this honorable Court. I ſat with Mr. Paſſmore once or twice for two or three hours at a time to draw up thoſe anſwers; I knew by the converſations I had with Mr. Paſſmore, that he had ſigned his name to and paſted up the paper at the coffee-houſe; I therefore did not put it to Mr. Paſſmore to ſwear to the contrary. I knew he could not do ſo without perjury; I was obliged therefore to ſay he did not do it with the ſmalleſt intent to treat the Court or its authorities with diſreſpect, and that he did not know or believe that there was a ſuit depending at the time. He ſuppoſed and believed it to have been concluded by the award and judgment rendered upon it. I ſaw there was but one loop-hole out of which we could creep, and that was by ſaying that there was no ſuit depending at the time. I therefore drew up Mr. Paſſmore's anſwer, that according to the beſt of his judgment and belief no ſuit was pending at that time. I at that time and all the time of the argument in ſupport of the anſwers, could not prevail on him to acknowledge there was no judgment againſt Pettit and Bayard; and ſtated to him that as William Haſlett had not been appointed with the concurrence of Pettit and Bayard, that his having acted as umpire would be fatal to the whole proceeding;

for one man to decide for another without authority for ſo doing was highly abſurd and not only contrary to all law and equity, but even repugnant to common ſenſe. The counſel for the proſecution, contended, among a variety of other arguments, that as there was no judgment againſt Pettit and Bayard, that there was a ſuit then pending; the Court were of that opinion. The adverſe counſel alſo obſerved, that Paſſmore had denied no part of the material fact, that on the contrary he had confeſſed in his anſwers, that he had publiſhed the paper; and concluded with urging the Court to make the attachment abſolute. In the courſe of the part I took in that argument, I was interrupted ſeveral times by the Court; not in a rude or intemperate manner; but in the manner that is uſual when counſel advance doctrines founded on fallacious grounds. I knew of no obligation I was under to the Court, jury or country to conceal facts; if ſuch an interruption had been given to me; if I had been ſo treated I ſhould ſtate the circumſtance now, and leave the operation to juſtice. I ſaw that I could not convince the Court; and finding it was uſeleſs to talk longer, I ſat down. But I moſt ſolemnly declare that I never was ordered to ſit down by this or any other Court ſince I have practiſed. When the judgment of the Court was given that Thomas Paſſmore was in contempt, I think the Chief Juſtice mentioned that it was a groſs libel, and that he thought it would have weight with the Court if Paſſmore would make atonement to the injured party, Meſſrs. Pettit and Bayard. It was ſo much a matter of courſe, ſo common a thing after a proſecution for a miſdemeanor had been tried and before ſentence paſſed, for the Court to ſay to the defendant if you will ſettle with the man you have injured, the injury to the public will be leſs and the Court will conſider it in their judgment; the thing is as cuſtomary as the round is to the mill-horſe. It did not ſtrike me as a proceeding unuſual or improper; on the contrary, I adviſed him to comply with the hint thrown out by the Court. I had labored with him while I was drawing up the anſwers to the interrogatories, to allow me to ſay in them, that it was done "in the moment of his heat and paſſion," &c.—I wiſhed him to expreſs himſelf mildly; and told him he might make the acknowledgment without committing himſelf as a man of ſpirit and a man of ſenſe; believing that a man of ſpirit and a man of ſenſe could, if he had done wrong, make acknowledgments without their affecting afterwards either his honor or underſtanding; but he was obſtinate and would not admit that any thing ſhould be put in the anſwers that would look like a conceſſion to Mr. Bayard, and would only ſay that it was done in paſſion. The next morning when Paſſmore came before the Court, the Chief Juſtice aſked if any thing had been done; the anſwer was in the negative. I think I then ſtated that Mr. Paſſmore had gi-

ver in his answers, and the impressions under which he made the publication. And Passmore attempted to justify, by saying that Mr. Bayard had due notice of the award; but this the Court had overruled before. It was then, I think, that Judge Yeates observed "we have heard enough; that the answers were an aggravation of the offence;" and Judge Smith said that it was adding insult to injury. The Court sentenced him to pay a fine of 50 dollars, and be imprisoned in the common jail of the county for the space of 30 days. I then requested the Court to allow him to be sent to the debtor's department, and not to that of the criminals, which they granted without hesitation. Upon Passmore's expressing a wish to see his family before he went to prison, and to be suffered to go there without an officer, I communicated it to the Court and solicited the indulgence that the Court would take his word and mine for his safe return. This was also acquiesced in by the Court. He then went home, and from there to the debtor's apartment, where he remained the 30 days, and paid his fine of 50 dollars. He came out about the latter end of the year 1803, and very soon after made an application to me to know what remedy there was for his case or what means there were to set aside the proceedings and judgment against him; I told him there was but one way to obtain what he wished, and that was to remove that judgment, by a writ of error, into the High Court of Errors and Appeals, if we could prove that the Judges in sentencing him to fine and imprisonment had committed an error in the law or the facts. He had applied to Mr. Hopkinson and Mr. Lewis, and said he would give any sum to have the judgment against him reversed. He requested me to confer with them at Mr. Lewis's house, and agree upon the mode of proceeding. I went to Mr. Lewis's house. I found Mr. Lewis and Mr. Hopkinson in the parlour; when I came into the room, they were in possession of Passmore's papers, who was also there; they told me, that from a perusal of the papers, and from the statement Mr. Passmore had given them of the business, they thought there was a fair chance of obtaining this object; we think a fairer chance can never occur, of reversing a judgment. But I, who knew the business all along, did not so clearly comprehend how the business was to be effected so easily. I asked them, "what is the ground of your opinion, gentlemen?" The reply was, why here are Mr. Passmore's papers, from which, and from his statement, we find that the rule of Court for entering into the reference, did authorize the choice of an umpire; and we think the Judges have erred in setting aside the execution, and have exceeded their jurisdiction. When, or from whom did you get that paper, gentlemen? Why, from Mr. Passmore. Did Mr. Passmore say to you, that it was a true statement of the facts? They replied that he had shewn it as the rule of reference, upon which the

judgment was founded. I was ſurprized that he would endeavor to impoſe on counſel in this way, to give it as the rule of reference, by which the referees were to be governed, when Mr. Paſſmore knew that it was a mere miſtake in the clerk; and he alſo knew that Pettit and Bayard had never agreed to the choice of an umpire. When I ſaw this conduct of Mr. Paſſmore, knowing as I did the incorrectneſs of his ſtatement, I muſt confeſs it ſurprized me; and then, for the firſt time, began to perceive the real character and views of the man. After I had explained the buſineſs, and placed it in a proper view to Mr. Lewis and Mr. Hopkinſon, they ſaid, "why Mr. Paſſmore, this alters the caſe altogether, for if the agreement did not ſay that the referees, in caſe of their diſagreeing, ſhall have the power to appoint an umpire, the clerk's ſaying ſo, does not make it valid; the clerk cannot make juries and referees for us; the judgment was irregular, and we ſee no way by which the judgment againſt you can be reverſed. It was then that Thomas Paſſmore, for the firſt time, declared that he muſt have ſatisfaction; that he ſaid he would have ſatisfaction; and if he could not obtain it in Court, he muſt apply to the Legiſlature for an impeachment of the Judges. When I ſaw this, and when I ſaw that he had attempted to deceive his own counſel, I began more clearly to perceive that I had been miſtaken in my opinion of Mr. Paſſmore. I then ſaid, Mr. Paſſmore, we cannot aſſiſt you with any thing of this kind. It is contrary to our opinions of what is right; and I truſt I ſhould be as unwilling both now, as then, to paralize the power of juſtice; I told him that I ſaw no ground whatever for impeachment of the Judges. He then applied to us, and wiſhed us to aſſiſt in drawing up the neceſſary papers; I immediately ſaid, I would have nothing to do with it, or even to draw up the papers, and Mr. Lewis and myſelf wrote him a letter, ſince publiſhed in conſequence of his miſrepreſentations, in which we refuſed in poſitive terms to have, either directly, or indirectly, any thing to do with the buſineſs. In February, 1803, Mr. Paſſmore came to Lancaſter, and applied to the Legiſlature for the impeachment of the Judges. In March, 1803, the cauſe came on, when the argument on the validity of the award took place. There were three exceptions filed againſt the award; one of the exceptions was, that one of the parties met the referees, when the other was not preſent nor notified; another was, that information by the plaintiff's affidavit had been communicated to the referees, without the knowledge or privity of Meſſrs. Pettit and Bayard, or their contents having ever been made known to them; the third was, that Mr. Paſſmore had not produced accounts of the loſs, and the referees had refuſed to poſtpone their deciſion, until they could be procured. Theſe three exceptions were filed. A fourth was prepared, but not filed.

The Court can look at the record, and perceive whether I am correct, or not. The award came to be argued on the 26th or 27th of March, 1803. The examination of witneſſes, and the arguments of counſel took up nearly two days; it was fairly and deliberately diſcuſſed; and after conſiderable debate on both ſides, which received a patient and attentive hearing, the Court determined that the award was irregular and void. They determined upon the three firſt reaſons that were ſworn to by the defendant; they alledged that as it was ſtated that the veſſel was not ſea-worthy at the time of her ſailing, that it was neceſſary to wait until accounts of the repairs could be received from Halifax, which would ſhew, whether among other repairs it had been neceſſary to give her a new bottom at Halifax; they decided that the referees had acted too haſtily, in not giving Mr. Bayard time to procure thoſe accounts; they decided alſo that the award was void, becauſe the umpire did not examine the witneſſes himſelf. But they ſaid nothing upon the conduct of Paſſmore, relative to the judgment or execution. The Judges had then been informed that there was an impeachment pending, and it appeared to me as a ground of delicacy in them not to ſay any thing upon this part of the ſubject.

The report was then ſet aſide, and as the action had been aſſigned to Mr. John Travis, I had, at that time, no further converſation with Paſſmore on the ſubject. When I had removed into the country, in September, 1803, Mr. Paſſmore had ſubmitted a caſe to me and he ſent a meſſenger and a letter deſiring my opinion in writing, which requeſt I complied with.

In February 1804 I had a converſation with Mr. Paſſmore; in which he converſed with me on the ſubject of my appearing as one of his witneſſes in ſupport of his application for an impeachment. I told him that he knew my opinion and that he need not call me forward; that I could not be of any ſervice to him, that I did not think it fair to come to this town and be obliged to be a witneſs againſt him; he aſſured me he would not ſummon me, and we parted in the utmoſt good humour. I received a line from him, in February 1804, which I thought a very kind letter. In this he expreſſed his regard for me and regretted that the committee of grievances had put me to the trouble of going to Lancaſter, and aſſured me that it was not done at his ſuggeſtion; this I thought was a very kind letter of Thomas Paſſmore, from which I conceived that no ill will could exiſt between us. If this honorable Court will indulge me I will read the letter. (Here Mr. Levy read the letter, the ſubſtance of which he had juſt ſtated.) But with all theſe profeſſions of regard and eſteeem, it appears he had loſt all confidence in me as early as September, 1802, nearly two years before.

MR. DALLAS. I wiſh the witneſs to ſtate particularly, whether, when the queſtion of the attachment was before the Court, or when the exceptions were argued, it appeared that notice of the award had been ſerved on Pettit and Bayard.

L. At the time of the attachment being argued, and the exceptions, the firſt of which took place in September 1802, and the latter in March, 1803, it would have been a conſiderable object to Mr. Paſſmore to prove that notice was ſerved. He mentioned a Mr. Berrett, who if we could get in a proper ſituation before the Court, as being able to prove the ſervice of notice; he ſaid that he had carried the award to the Coffee-houſe, and that Mr. Bayard muſt have ſeen it. In three minutes after he ſaid he did not know that Mr. Bayard had ſeen the award.

D. I aſk Mr. Levy, whether in the converſation in which he urged the neceſſity of making proof of the notice having been ſerved, whether or not Paſſmore did refer to any perſon in particular who could make proof of the ſervice?

L. As well as I recollect, he never mentioned any body to me that could prove it except Mr. Berrett.

D. Did he not mention Mr. Shoemaker and ſay that he could make proof of it?

L. I think I can truly ſay, as ſurely as any man can prove a negative, that Paſſmore never mentioned Mr. Shoemaker; when Mr. Shoemaker was examined in Court, he knew nothing about the circumſtance.

D. I aſk the witneſs whether during the inveſtigation of the attachment or exceptions, there was any proof of Mr. Bayard's acceding to the choice of an umpire?

L. I know of none, ſir.

D. I aſk Mr. Levy whether he would not have thought it important to have proved it?

L. I conſidered it all important; it would, if he could have proved it, have ſhewn that the exceptions were too late; it was all-important.

D. Whether at any time he was furniſhed by Paſſmore with information of the fact?

L. Never; or I certainly would not have drawn up a notice on the 31ſt of Auguſt, if I could have proved that notice had been given.

D. I wiſh Mr. Levy to ſtate whether when he ſat down, he ſat down irritated with the conduct of the Court?

L. No, ſir; I had no reaſon to be irritated.

D. I ask the witness, whether subsequent to the argument on the attachment he called on Passmore to take a walk with him, in which he said the judges had shewn a great deal of anger?

L. Never, in my life; I never asked Mr. Passmore to take a walk with me, or said that the judges had acted in an angry manner. I never make fair weather with clients; if I have not sufficient talents and industry to merit their patronage, I never caress or cajole them.

D. Then I understand the witness to say that he never asked Passmore to take a walk with him?

L. If I can trust my own memory, I never thought of such a thing in my life.

L. I ask the witness whether in the conversation between Passmore and his three counsel the reason assigned for declining to assist in removing the judgment into the high Court of Errors and Appeals, was that the original agreement varying from the rule of Court must have gone up with the writ of error?

L. Yes, sir, we considered the rule of Court made out by the prothonotary's clerk as nothing, it being done without authority from the parties.

D. Did the other two gentlemen express surprize at being informed by Mr. Levy, of the real state of the circumstance?

L. Yes, sir; they were surprized; and thought it a very extraordinary circumstance, that a man of Mr. Passmore's understanding, should attempt to furnish false papers to his counsel, knowing them to be untrue.

D. I ask Mr. Levy, whether there was in the deportment of the Court, either towards the witness or his client, any thing indecorous, overbearing, or oppressive?

L. I never saw any thing indecorous, overbearing, or oppressive on the part of the Court. It appeared to me that their permitting Mr. Passmore to occupy a room in the debtors apartment, instead of the criminal, was an act of indulgence, which shewed mildness and lenity; although they meant to carry into effect the laws of the land.

D. I wish the witness to be particular as to the manner in which the argument was placed on the lists of the Court? Was it urged?

L. It was not accelerated; it came on in its turn.

D. Had the Court any thing to do with accelerating or protracting that argument?

L. Surely not. The prothonotary generally gives notice in the vacation, shortly before the meeting of the Court, to the counsel employed in the suit. Every cause is placed in its order on the list. This was done in that way.

D. I ask Mr. Levy whether he did not receive notice from the counsel of Messrs. Pettit and Bayard.

L. Yes, sir.

D. I wish the witness to state whether this notice was communicated to Passmore?

L. Yes, sir.

D. I ask the witness whether at the time when he gave up the execution, Passmore took him by the arm and asked him what he was about?

L. If he did it was in such a way as made no impression on my mind. If it was, it was done in a friendly manner. If it had been otherwise I should have returned him the bank bill that he gave me, and told him to apply somewhere else.

D. I wish Mr. Levy to state whether from the time of his being retained in the cause of attachment he ever received letters from Passmore; and whether they were unfriendly?

L. I received none that were unfriendly, on the contrary, I received several that began with "dear sir," and ended "affectionately." I never knew that Mr. Passmore was displeased with me, till I was before the committee of grievances, and then I was convinced that whoever did not join in with him, must meet his reproach.

D. I ask the witness whether he recollects that on the argument that set aside the report, the protest that was produced contained evidence that the mariners had refused to go on board the vessel?

L. The protest, as well as I recollect, and I think I do remember accurately, did contain evidence that the sailors were afraid to go to sea in the vessel. In consequence of this, I believe I was applied to by Mr. Bayard's counsel to join in a commission for taking testimony at Shelburne. But I knew we could get nothing from there that would be of any service to us. I therefore said nothing about Shelburne.

D. I wish the witness to state whether an action, for the recovery of the loss is not now pending in the Supreme Court for trial by jury?

L. I believe it is.

THOMAS HENNESSY—sworn.

L. I was clerk in the Supreme Court for nearly eight years. The first of the proceedings relative to this case, that came

within my knowledge, was the filing of the report of the referees. It was on the 6th of Auguſt, 1802; I acted in regard to that report, as I do in all ſuch caſes; I examined the rule of reference, and found by the tenor of it, that the report was to be made into the office, and judgment entered, I immediately entered it and endorſed on the back of that report, "6th Auguſt, 1802, judgment, ſecundum regulam." Some ſhort time afterwards, Mr. Paſſmore called and got a copy of the report, as filed; and, in ſome days afterwards, applied for an execution. There were ſome difficulties ſuggeſted by Mr. Ripley, who was alſo in the office at that time, as to granting the execution. He ſpoke to Mr. Burd, and Mr. Burd refuſed to grant an execution upon that report, alledging that the proceedings were irregular. I do not recollect all his reaſons, but one was, that the judgment, as confeſſed by me, was irregular; whereas, it ought to be entered by Mr. Ingerſoll, or ſome attorney of the Court. Mr. Paſſmore went away. On the 18th of Auguſt, he brought a paper, ſigned by Peter A. Brown, for S. Levy, directing judgment to be entered for the ſum found by the referees. I have made a miſtake, the order was in Mr. Brown's hand writing, ſigned S. Levy, not Peter A. Brown. This circumſtance was made known to Mr. Burd, and Mr. Burd declared he was ſatisfied that the reſponſibility was taken off his ſhoulders, and the execution might iſſue. Mr. Paſſmore ſeemed very anxious to obtain the execution, being, as he ſaid, afraid that the defendant would take out a writ of error. The day following, the execution was demanded and iſſued. It appears, by the ſheriff's return to the execution, that a levy was made on the ſame day. The exceptions to the report of the referees were filed on the 4th of September, 1802. On the firſt day of the term which was the 6th of September, 1802, a motion was made by Mr. M'Kean, to ſet aſide the execution, which it appears was done by conſent.

Mr. Dallas. I wiſh Mr. Henneſſey to ſtate, whether Thomas Paſſmore ever ſhewed to him the paper that was poſted up at the coffee-houſe?

H. On the 6th of September, 1802, I think it was in the morning, Mr. Paſſmore called at the office, and aſked to ſee the exceptions again. I ſhewed him the exceptions; he read them over attentively, and he declared that Mr. Bayard had ſworn to what was falſe, and he would prove it ſo. He then ſhewed me a paper, which I cannot ſay poſitively was the ſame paper which was paſted up at the coffee-houſe; but from the tenor of it, I really believe it was. I read the paper, and requeſted him not to put it up; that I was afraid the Court would bring him before them for a contempt. His reply was, that he was not afraid of that, as he had applied to a lawyer, who had told

him it was not a contempt. I then told him to do as he tho't proper. I know nothing further, sir.

Mr. DALLAS. I ask the witness at what time the variance between the rule of Court, and the agreement was discovered?

H. As well as I can recollect, it was on the application for the execution.

D. I wish the witness to state, whether at any time, and when, this variance was communicated to Passmore?

H. I think it was communicated to him at that time, sir.

Peter A. Brown, Esq.—sworn.

At the time the action between Mr. Passmore and Messrs. Pettit, and Bayard was entered, I was reading law in the office of Mr. Sampson Levy. The action was entered by Mr. Levy, but I saw nothing of it till after the award was made. Mr. Passmore then came to me, Mr. Levy had gone out of town, and left me to do his business. Mr. Passmore told me he was afraid that it would be superseded by a writ of error. I gave him the order for the execution; he took it to Mr. Burd's Office, and returned again in a few minutes. He told me Mr. Burd would not grant him the execution, and requested me to walk with him to the office; I went with him to the office, and Mr. Burd explained to me the reasons why an execution could not issue. That Mr. Ripley had made a mistake, and that the appointment of the umpire, was not warranted by the original agreement. I then looked over the papers, and I found by the original agreement there was a power to Mr. Ingersoll or any other attorney to confess judgment. Mr. Passmore then requested me to make use of that authority and confess a judgment. I was in doubt whether I ought to do it, and conversed with Mr. Burd on the subject. On the one hand Mr. Passmore pressed me very much to do it and said that if I did not he would represent me to Mr. Levy, and would make him or me answerable for the consequences, if it was not done. On the other hand, Mr. Burd told me, that if Mr. Levy had no authority to appear and confess judgment, and an execution issued, that an action would lie against him. Mr. Passmore then said, that he did not wish an execution against the body, but a fieri facias, but that levied so that the goods should not be removed. I then drew up a confession of judgment, and signed Mr. Levy's name, as I had authority to do. I gave an order for an execution, which was issued. I heard no more of the business until Mr. Passmore called on me one morning. He said he wished me to tell him whether it would be a contempt of Court to publish any thing after final judgment was entered in an action. I told him I believed it would not, and I think I referred him to one or two authorities in

ſupport of my opinion. He then pulled out of his pocket a paper which he ſaid he was going to put up at the Coffee-houſe, and I then for the firſt time found that his queſtion related to the caſe of Pettit and Bayard. Mr. Paſſmore did not tell me that the execution had been given up by Mr. Levy, or that any thing had been done in it ſince the execution had iſſued. He then aſked me whether it would be a contempt for him to put up the paper. I told him that if the judgment was a good one, it would not. But, ſaid I, Mr. Paſſmore, for God's ſake don't put it up. We converſed for ſome time on the ſubject and I adviſed him by every argument in my power not to put it up. He ſtill perſiſted and ſaid he would. I then told him, Mr. Paſſmore, I'm a very young man, will you do me one favor. If you inſiſt upon putting it up, go to Mr. Moſes Levy firſt, and aſk his opinion. He didn't tell me whether he would or not, but I expected that he would go to Mr. Moſes Levy.

Mr. DALLAS. I aſk the witneſs whether he was or was not before the committee of Grievances, on a ſubpœna, laſt winter, to give teſtimony in this caſe; and by whom that ſubpœna was ſerved,

B. It was ſerved on me by Mr. Ludlam.

D. Did Mr. Ludlam ſerve the ſubpœna on you, to give teſtimony before the Senate in the preſent inſtance.

B. I believe not, ſir. The ſubpœna was ſerved on me by one of Mr. Burd's clerks.

D. I aſk the witneſs whether he had not a converſation with Paſſmore, in which he had threatened to prove him perjured if he perſiſted in what he had ſaid?

B. When I was here laſt winter I had frequent converſations with Mr. Paſſmore, and I told him that if I was to give my teſtimony I ſhould have to ſtate that he had ſhewn me the paper which he had poſted up at the Coffee-houſe. He told me that I was incorrect—that he had never ſhewn me the paper. He hoped I would not ſtate it, for if I did, he would ſend to Philadelphia for two witneſſes, and prove by them, that he wrote the paper and took it immediately to the Coffee-houſe. I told him that I could not help it—that I muſt ſtate what I knew on the ſubject. Accordingly when I was brought before the Committee of Grievances, I told them that my evidence extended to two or three different things. I was then informed that I had only to anſwer as to what happened in Court in relation to Mr. Paſſmore. I have had two or three converſations with Mr. Paſſmore ſince,—the laſt of which was in my own houſe, in which he always denied that he ſhewed me that paper. He ſaid that he had ſhewn me another, but that he had never ſhewn me the original.

D. I ask Mr. Brown, whether he is positive that the paper shewn to him by Passmore, is the one that was posted up at the coffee-house?

B. I have seen the original in Mr. Burd's office. I have seen the copy in Mr. Passmore's hand writing. I think in substance at least they are the same.

D. At what time in the morning did Mr. Passmore shew you the paper?

B. I have endeavored to recollect, but I cannot say with certainty. It was in the morning, but I am not certain at what hour.

D. Did Passmore say that he had applied to any other counsel than yourself?

B. Not at all, sir.

D. Did Passmore tell the witness, that the judgment was set aside, and that the business was still pending before the Court?

B. He did not, sir, nor did I know it until a long time after.

Adjourned till 3 o'clock, P. M.

SAME DAY, *P. M.*

Mr. Boilleau. Mr. Speaker, when I had the honor first to address you on this subject, I stated that I was not conversant with juridical proceedings; but, I hope, when I follow my friend Mr. Dallas, in asking questions, it will, no doubt, be on safe ground; and, I hope I may be indulged in asking Mr. Brown one or two questions more. Some questions, sir, were put to Mr. Brown, relative to what passed at the time he received the subpœna to attend the committee of grievances. I wish him to state, whether or not, when Mr. Passmore called him forward as a witness, he expressed surprize, and stated his reasons for objecting?

B. Mr. Passmore knows very well that I am a young man, and just entering into business. At the time I was summoned to attend the committee of grievances, the Common Pleas were then sitting, and it was very inconvenient for me to leave the city.

B. I ask the witness, whether there was not some other reason that he assigned for his wishing to be excused; if he did not inform Mr. Passmore that he was a very young practitioner, & that his testimony, perhaps, might displease the Judges, and they would set their faces against him?

B. Never such words in the world, that I recollect.

though I cannot recollect the words, they amounted to calling his attention to the subject before the Court, by simply asking "how he answered this argument, or how would he obviate that part of the evidence." Mr. Levy in this way was interrupted, it is true, once or twice, but he went on with the defence. I remember, however, that he said in a manner very common at the bar, "may it please your honors, I am not anxious to press this subject. If your minds are made up on it, and I cannot hope to remove your objections, I am not disposed to trouble you further." After this, the rule to shew cause why an attachment should not issue, was made absolute; and, I think, on the part of the prosecution, (as it was then proper to terminate) we insisted upon judgment; considering that we had established the facts of writing and publishing the libel, which were all that the law required to constitute the offence charged. Mr. Levy, on the part of the defendant, insisted that interrogatories should be filed. Mr. Dallas and myself objected. Mr. Levy, however, persisted in the call for the interrogatories on the part of the defendant; and after some altercation between the counsel, the Court ordered the interrogatories to be filed. I well recollect using this expression, "remember Mr. Levy, that the filing interrogatories is at your own instance, and not at ours." The interrogatories were drawn up at the bar by Mr. Dallas and shewn to me by him. A copy of them was filed and I believe the counsel for the defendant was furnished with another copy. After these interrogatories were filed, the subject was mentioned again and again to the Court, and at last the answers were also filed. On the 27th of December the question was brought before the Court. Then Mr. Dallas produced a number of authorities in support of the prosecution; and on the part of the defendant Mr. Levy was fully heard in answer. It was contended on the part of the prosecution that the answers to the interrogatories rather encreased and aggravated the offence; and could not be considered as purging the contempt; since they did not deny but affirmed the fact charged. On the part of the defendant, Mr. Levy urged that the defendant had sworn that he intended not in the slightest degree to treat the Court with contempt, as the answers to the interrogatories state expressly; that there was not a word of insult in the answers to the interrogatories; and that the defendant had a right to state that there was no fact pending to the best of his knowledge and belief. He concluded with observing that the publication was a hasty and unjustifiable act of Mr. Passmore; and that he had acknowledged it to be so. After a short answer on the part of the prosecution, and not before, his honor Judge Yeates, in the first instance, observed that it would be proper for Mr. Passmore to make some atonement to the injured individual; and that it might have some influence on the judgment of the Court. On this suggestion the case rested till the next day:

Mr. Paſſmore was called up on the 28th, and the queſtion was then aſked, I think by the Chief Juſtice, "whether any atonement had been made, or any thing done?" The anſwer was in the negative. I have no accurate recollection of what paſſed afterwards, as I went out of the bar into the lobby; and I rather ſuppoſe that at the time ſentence was paſſed, I remained there. After the ſentence I can recollect ſome obſervation being made by Paſſmore; but as I did not hear it diſtinctly, I cannot be certain what he ſaid, and it will not be proper to ſtate what I have been told by others. But at that time, his honor Judge Yeates obſerved, that the Court had paſſed ſentence, and could hear no more on the ſubject, I think his honor Judge Smith obſerved, that the conduct of Mr. Paſſmore was adding inſult to injury; but to what he particularly alluded, I cannot now recollect.

Mr. DALLAS. I aſk the witneſs, whether during the whole of the diſcuſſion, he obſerved either in the language or deportment of the Court, any thing rude, overbearing, or oppreſſive?

M'K. Nothing, ſir, that I think would juſtify the expreſſion.

D. I wiſh Mr. M'Kean to ſtate whether at the time Mr. Levy ſat down he was in a ſtate of irritation, or expreſſed indignation at his treatment?

M'K. I was ſo far diſtant from Mr. Levy at that time, that if he had uſed any ſuch expreſſions, I ſhould not very probably have heard them. I ſuppoſed him to be a little mortified, as counſel commonly are, when they fail in their argument.

D. Did he not obſerve an uncommon degree of heat between the counſel for the proſecution and Mr. Levy which will account for his indignation?

M'K. Mr. Levy ſat on the weſt ſide of the table, Mr. Dallas on the eaſt, and I think I ſat in the front; I cannot recollect particularly, but I think ſome little difference occured between them, but I do not recollect what it was.

D. I aſk the witneſs whether he recollects on the argument for ſetting aſide the report, it appeared that the cauſe was regularly marked on the liſt, and brought regularly forward for argument?

M'K. I believe it was, ſir; I think it was marked at the ſettlement of the docket. Exceptions to reports of referees are uſually ordered to be heard on Friday. On the Friday of the term, this cauſe was begun to be argued, but not early, as I believe an order cauſe occupied the firſt part of the day. The argument, I think, occupied the remainder of that day, and I think until 4 o'clock on the laſt day of the term, when a ſhort ad-

journment took place, & the diſcuſſion and deciſion were finiſhed in the evening.

D. Whether he, or to his knowledge, his colleague ever made any application to the Court, for the purpoſe of bringing this caſe to an argument, out of its uſual and regular courſe or order?

M'K. I certainly do not recollect our ever applying to the Court, or making a motion for that purpoſe.

D. I wiſh Mr. M'Kean to ſtate, whether there was not a conſultation between him, his colleague, and their client, to bring the validity of the report to an early and final iſſue?

M'K. We certainly were extremely anxious on our part to have the buſineſs brought to a deciſion. We wiſhed that the defendants might not appear cenſurable on the ſcore of delay, as had been inſinuated.

D. I aſk the witneſs whether that action is not now pending for trial by jury?

M'K. I believe it to be ſo.

CROSS EXAMINED.

Mr. Rodney. Mr. Speaker, I think the Attorney General ſtated that when he applied for having the execution ſet aſide, he was fearful the clerk would miſtake it for a motion for a rule to ſhew cauſe, and that no motion was made to ſuſpend the judgment.

I wiſh to aſk him whether upon exceptions being filed to an award, the judgments are to be ſuſpended in all caſes until the merits of the exceptions are decided?

M'K. If I underſtand the queſtion, ſir, I anſwer, that it is not unuſual in caſes of this kind, to apply for a rule to ſhew cauſe why the execution ſhould not be ſet aſide, and I was apprehenſive that I might be underſtood as moving for a rule to ſhew cauſe.

Mr. Rodney. Do I underſtand the attorney-general as ſtating that there ſhould be a rule to ſhew cauſe granted, or that the judgment remains ſuſpended unleſs the defendant gets rid of the exceptions and whether without any act of the Court they can ſuſpend the judgment?

M'K. After exceptions filed there can be no judgment till the exceptions are diſpoſed of by the Court. If the exceptions to the report of referees are filed, within the time allowed, there can be no judgment unleſs the exceptions are overruled. The exceptions filed are a bar to judgment until diſpoſed of by the Court.

Mr. DALLAS. I will make a statement that will probably explain this matter. By an act of assembly a reference takes place on consent of both parties and the report of referees, after approbation of the Court has the effect of a verdict. There are two courses observed on the occasion, one is to expedite and dispatch, where the referees may report into office of the prothonotary, when the Court is not in session, and the consent of parties works approbation. If no exceptions are filed within four days after report made into the office and notice given to the opposite party, then judgment becomes absolute. In the other case the parties do not dispense with the approbation of the Court, the report is read the first day or any other day of the Court, & if no exceptions are filed within four days after reading, the approbation of the Court is implied and judgment confirmed.

M'K. The exceptions stay the effect of the report until the Court disposes of them. When the reports are brought in, judgments are entered *Nisi*, which become absolute unless exceptions are filed within the four days.

ANDREW BAYARD—sworn.

Mr. Speaker, and gentlemen of the Senate.—In obedience to the summons from this honorable Court, I appear to give testimony on this trial, though under circumstances peculiarly unpleasant and embarrassing—considering myself as being in some measure incidentally the cause of this prosecution, which has involved in it so much trouble and expence; being party in a suit now pending in the Supreme Court, between Thomas Passmore, and Pettit and Bayard, and not without some emotions of resentment for the unprovoked attack on my character by that man; I feel apprehensive, that the testimony I am about to offer, may be considered as influenced by such considerations; but, trusting to the liberality of the Senate, who I sincerely hope will impute to me no improper motives; I shall proceed to answer the questions put by the learned counsel, as well as my recollection will enable me.

Some time in the fall of 1801, a policy of insurance was brought to me on the brig Minerva, said to belong to Thomas Passmore. As one of the firm of Pettit and Bayard, I subscribed 500 dollars to the policy, in the name of the firm, I heard nothing further of the transaction for some months after, when a report was in circulation in Philadelphia, that the vessel having sprung a leak, had put into Shelburne, Nova Scotia. I believe when the report first came to my knowledge, it was in March or April following—perhaps in the latter month. Shortly after, Thomas Passmore having received further knowledge of the fate of the vessel, called upon the underwriters for the

payment of the loſs, and ſaid that he was entitled to it, the veſſel having incurred expences, amounting to more than half of her value—which would have entitled him to abandon, according to the principles of underwriting, provided regular accounts had been produced, which was not the caſe, as he exhibited no other documents than a proteſt and ſurveys, in which an eſtimate was made by the ſurveyors, of the amount that would be neceſſary to compleat the repairs. I conceived, therefore, that no claim of this kind exiſted, from there being no evidence of any accident on the paſſage which could juſtify ſuch an expenditure, of the ſum mentioned in the ſurvey. I therefore reſiſted the claim; but, in conſequence of the repeated applications, and urgent demands of Paſſmore, all the underwriters agreed to ſubmit the matter to referees; but as ſome of them were not in the habit of attending to ſettlements of this kind, and ſuppoſed me better acquainted with inſurance buſineſs, they all requeſted that I would take the whole management upon myſelf. When Thomas Paſſmore firſt came to aſk me if I would agree to the reference, I think I told him that it was to no purpoſe to go into it, as I thought that no claim exiſted; that the veſſel could not have been ſea-worthy when ſhe ſailed as ſhe had met with no important accident to juſtify ſuch an amount in expenditure for repairs, and that no teſtimony of the amount of repairs had been produced, nor any evidence except the rough eſtimate made in the ſurvey. However, notwithſtanding all theſe objections, I agreed to the reference. Having uſually buſineſs that called me to the coffee-houſe, we met there one day, and Mr. Pearce happening to be preſent, I requeſted him to ſerve as an arbitrator, which he conſented to. I then requeſted Paſſmore to nominate his referee, and he nominated Mr. Hugh Henry. I told Mr. Paſſmore that I conſidered Mr. Henry, from his vocation in life, and from his not being converſant with the principles of underwriting, as an improper perſon to ſit as a referee on ſuch a queſtion. I ſtated to him, that in my opinion, Mr. Henry never had an opportunity of becoming acquainted with the nature of inſurance, and that it required a conſiderable knowledge of the buſineſs to enable a man to decide accurately. Paſſmore continued deſirous of having Mr. Henry appointed. I believe I then told him, Mr. Paſſmore, you might as well ſay that Mr. Henry was qualified to fill the office of treaſurer of the United States, as to ſay that he is fit to act as a referee in this buſineſs. He replied, that he thought Mr. Henry equal to diſcharging the duties of any office whatever that he might be entruſted with. He at length, however, yielded to my objections, and agreed to appoint another. I then requeſted him to nominate any man of character, who was acquainted with the nature of underwriting. He then nominated Mr. Peter Kuhn. I told him that I had no objections to Mr. Kuhn;

that though his talents might not be ſuperior to thoſe of Mr. Henry, I knew him to have been a ſhipping merchant, and that he was acquainted with underwriting and mercantile concerns generally. The day after, Mr. Paſſmore informed me, that he had waited upon Mr. Kuhn, and that he had declined ſerving, and he inſiſted on Mr. Henry's being the referee. I told him that I thought he might get ſome other perſon who was acquainted with the buſineſs, and who would agree to ſerve; but as he ſtill inſiſted on Mr. Henry, and as I reflected that he had an equal right of nomination with myſelf, I agreed to his nomination. Upon this we parted. There was no notice of the meeting neceſſary; the day we met we went into a room in the coffee-houſe, and ſat down to the buſineſs, when Mr. Paſſmore laid before the referees the two ſurveys, a proteſt of the captain, with ſeveral other papers; but no account of the repairs was at that time, nor at any time afterwards produced to the referees. He proceeded to ſtate his claim, and urged that as the repairs had exceeded more than a moiety of the value of the veſſel, he was entitled to and conſequently ought to abandon her to the underwriters. After he had ſtated his caſe I proceeded to make my objections. I remember that Mr. Henry at that time gave an opinion decidedly adverſe to our claim. I addreſſed him in words to the following effect:—"Suppoſing a veſſel inſured, leaves the port of Philadelphia, bound to Europe, meets with a ſquall in the courſe of her voyage and carries away a yard or topmaſt, puts into a neighboring port, ſuppoſe New-York, and upon examination it is found that ſhe requires a new bottom, or ſheathing, are the underwriters obliged to make good all the repairs?" His reply was "certainly ſir—all repairs of whatever nature." I then obſerved that it was "contrary to all precedents and principles of inſurance;"—and that the buſineſs appeared to be decided as far as it depended on his opinion. I came away. The referees being left to themſelves, I underſtood did not come to a deciſion. After ſome time had elapſed, and without knowing what had been done by the referees, I went to the coffee-houſe for the purpoſe of ſeeing Mr. Pearce, and on enquiring for him, was told by the bar-keeper that Mr. Pearce was in company with ſome gentlemen in a room up ſtairs, of which he gave me the number. I went up ſtairs but upon opening the door, I ſaw Mr. Pearce, with others ſitting around a table, and conſidering that it was improper for me to go in, I was about to retire when Mr. Henry called to me to walk in, ſaying it is on your buſineſs Mr. Bayard that we are now engaged." Upon this invitation I went into the room, and took my ſeat at the table, and expreſſed my ſurprize at this exparte proceeding—that the referees ſhould meet without my knowledge, and that Paſſmore ſhould be exhibiting papers to them in my abſence, although he had not yet furniſhed the accounts of the repairs

noble on the brig; and concluded with requesting them to postpone the business until Passmore produced, or until I could procure the accounts from Shelburne. I told them that I hoped they would not come to a decision until those papers were procured. In the course of a day or two after, as I was going into the coffee-house, I was met on the steps by Mr. Barret, who observed to me that the decision had gone against me. In about five minutes after, Passmore met me, and made the same observation. As I conceived the award to be unjust, I determined to consult counsel before I would pay it. I accordingly waited on Mr. Ingersoll and stated to him my objections to the award, and was told by him that he thought there were sufficient grounds to file exceptions to the award, but he observed that it would be proper to wait until I had received notice. However, in a few days after, to my great surprise, a sheriff's officer visited me with an execution. It was a thing totally unexpected, and I requested him to wait until I had asked the advice of counsel. In consequence of which I again waited on Mr. Ingersoll and communicated the circumstance to him, upon which he wrote a note to the sheriff requesting him to desist, and informing him that he would be answerable for his not suffering in the business. Some time elapsed before I received a notice of the award being filed and judgment entered against me; and on the day after I received the notice, I swore to my objections and had them filed in the prothonotary's office. At the next term after the objections had been filed, a motion was made by my counsel to have the execution set aside. In a day or two after I was met by a friend, or acquaintance, who told me that I had been posted at the coffee-house. I enquired by whom? He told me, by Passmore, on account of my not having paid the amount of my loss on a vessel that I had underwritten. I could scarcely think he was serious, being conscious that I had given no just cause for such a procedure; and having never expressed an angry word to him; in the course of a few years, we had paid losses on insurances to the amount of fifty or sixty thousand dollars, and it was not reasonable to suppose that I would suffer so small a sum as five hundred dollars, if the demand was just, to become a ground of dispute. I could I conceive what could induce Passmore to such a measure. I went to the coffee-house, and on enquiring of Mr. Kitchen, the keeper, I was told by him that such a paper had been put up by Passmore, but that he had taken it down as soon as he had discovered its purport. I requested a sight of the paper. He informed me that he did not conceive it was his duty to shew it, and that he intended to destroy it. I told him that I had a right to, and insisted upon a sight of it. After some further hesitation on his part, he delivered up the paper to me and the perusal of it excited emotions that I cannot now describe. I was in doubt whether to determine on calling per-

ſonal vengeance or applying to the laws of my country for redreſs. However, upon reflection, I went to Mr. Ingerſoll, and told him the conduct of the man. He adviſed me to ſeek redreſs by a courſe of law, but as Paſſmore had ſuggeſted to him that he conſidered him as his attorney, in conſequence of having aſked his opinion during the courſe of the buſineſs, (which I conceived had been only done to deprive me of the benefit of his talents and aſſiſtance) Mr. Ingerſoll, from motives of delicacy, declined to act for me, and referred me to Meſſrs. Dallas and M'Kean. As to my agreement to the choice of an umpire, I do declare ſolemnly, that I do not recollect any propoſition for chooſing a third perſon. As to notice from the prothonotary's office of the award being filed, I believe I have already ſtated that I received none; but I again declare, in the moſt ſolemn manner, that I never received any notice of it, until the notice from Mr. Moſes Levy was delivered to me, on which I filed the exceptions, the day following.

D. I wiſh to aſk the witneſs, whether he was in Court at the time, when a motion was made for a rule to ſhew cauſe why an attachment ſhould not iſſue againſt Paſſmore, or whether he was in Court at any of the ſubſequent proceedings againſt Paſſmore?

B. I was not preſent at any of thoſe times when Paſſmore was brought before the Court to anſwer for the contempt. I did not attend from motives of delicacy, and conſidering it as an affair between him and the Court. But had not the Court acted as they did, I ſhould have ſought for ſatisfaction in an action for a libel.

Mr. Dallas. It has been ſtated, Mr. Speaker, by the elder and younger Mr. Levy, that after the report was ſet aſide, notice was given to Paſſmore, that a rule would be applied for, for taking teſtimony in Nova Scotia. The elder, Mr. Levy, has ſtated expreſsly, that he communicated this application for a rule to take teſtimony to Thomas Paſſmore, and has ſaid, that he told him, that according to his beſt judgment, that no teſtimony from Shelburne would be of any advantage, and it was on this ground that Paſſmore unequivocally refuſed joining in the rule. The honorable Court will recollect, that Paſſmore has ſaid, that the only reaſon for declining to join in the rule for taking teſtimony, was, that he had transferred his intereſt in the action to Mr. Travis. That teſtimony has been taken and received a few days ago. I hold it in my hand, and I am ſhocked to tell this honorable Court, that when the veſſel was ſearched from ſtem to ſtern, her bottom proved to be nothing better than a rotten plank, not fit to ſend rats to ſea on, and her timbers forced out of their dovetails. Sir, this is concluſive evidence as to Paſſmore's not joining in the propoſition to get teſtimony from Shelburne. I will put it into the hands of the honorable counſel for the managers; let him examine it, and ſtate the reſult himſelf.

TUESDAY, January 15th, 1805.

Mr. Dallas. Mr. Speaker, every man can recollect that there is a mode of putting a queſtion, the meaning or purport of which cannot be miſtaken. In the queſtion aſked Mr. Peter A. Brown, whether he was not afraid of incurring the diſpleaſure of the judges, by giving his teſtimony before the Committee of Grievances,—in that queſtion there is more meaning contained than what it would at the firſt view indicate. Sir, the mode of putting this queſtion ſhews that it does ariſe from my worthy friend, the manager, but from——

Mr. Boileau. Mr. Speaker, I truſt that the characters and and feelings of our witneſſes, will be protected. If the gentleman thinks proper to make remarks upon me, he has full liberty to indulge himſelf, but not upon the motives of our witneſſes. If he has to animadvert upon characters, I ſtand upon the ſame ground with himſelf; but he has no right to impute improper motives to perſons who do not enjoy the ſame advantages that he does.

Mr. Dallas. What no right to animadvert on the motives of the witneſſes, but only on the teſtimony? I muſt and will animadvert on their motives, and animadvert moſt freely. But, ſir, why this interruption? was it to avert an inveſtigation of the motives of a man who has charged his own counſel with being guilty of corrupt conduct? Nor do I mean by my animadverſions upon the motives of this enviable and amiable character to inſinuate that he has been guilty of perjury. That, ſir, is not neceſſary. I only wiſh perfectly to ſhew what are the diſpoſitions— what are the motives that influence Thomas Paſſmore on this occaſion.

We ſhall now proceed to examine a witneſs cited in ſupport of the proſecution.

Mr. George Ludlam—(called by the counſel for the reſpondents, and examined a ſecond time.)

Mr. Dallas. Mr. Ludlam, you will pleaſe to ſtate to the Court whether you were preſent at a meeting between Mr. Brown and Mr. Paſſmore, at the time you ſerved the ſubpoena on Mr. Brown, and to relate what paſſed at that meeting?

L. I recollect nothing, ſir, except that when I handed Mr. Brown the paper he turned round and ſaid "my God, Mr. Paſſmore, why did you ſerve me ſo, you know I can be of no ſervice to you." Next morning I found him at the Stage office.

D. I underſtand the ſubpoena was, to attend the Committee of Grievances.

L. Yes, ſir.

D. Did he intimate any apprehenſions of diſpleaſure from the Court in conſequence of his teſtimony?

L. Not that I know of.

D. Did you leave him with Paſſmore, or did Paſſmore go away with you?

L. To the beſt of my recollection Mr. Paſſmore and myſelf came away.

MR. DALLAS. Mr. Speaker,—at this ſtage of the proſecution I had intended to have examined a very material and intereſting witneſs who is unfortunately abſent, I mean Mr. Pearce the third referee. That gentleman has been ſummoned as a witneſs on behalf of the judges, but has not attended; though I am confident, for ſuch I believe to be the honor and integrity of that gentleman, that ſickneſs or ſome unavoidable buſineſs could alone have prevented him from complying with his citation. It is not an uncommon thing that when a witneſs has once been heard on a ſubject, for both parties to conſent to receive his written examination; Mr. Pearce was examined before the judges of the Supreme Court, when Mr. M. Levy for Mr. Paſſmore and I for Meſſrs. Pettit and Bayard, took the teſtimony of Mr. Pearce. If therefore the counſel for the proſecution does not object, I propoſe to him to have my notes and thoſe of Mr. Levy on the ſubject read, and ſubmitted to the conſideration of this honorable court. I am perſuaded that the learned counſel wiſhes to do every thing properly, therefore to accommodate him and afford him an opportunity of examining thoſe notes I ſhall go out of the order which we intended, and call Mr. Nicklin.

PHILIP NICKLIN—sworn.

Mr. DALLAS. I wiſh Mr. Nicklin to ſtate whether he ſubſcribed the policy of inſurance on the brig Minerva and to ſtate all the circumſtances of that tranſaction that may have come to his knowledge?

Mr. NICKLIN. The policy of inſurance in queſtion was ſubſcribed by the firm of my houſe,—I believe written by my partner. I believe, I myſelf ſhould not have entered into the policy at all, knowing the veſſel better than my partner, Mr. Griffith, did. I am not confident that the firſt application for payment of the loſs was made to me alſo. The Underwriters having agreed that Mr. Bayard ſhould have the whole management of the buſineſs, I gave myſelf no further trouble about it. It is now ſo long ago that I don't know whether I had any, and if any, what converſation on the ſubject, from the time that the reference was entered into, until Paſſmore demanded payment of me, in conſequence of the award being ſigned by two of the parties. When Mr. Paſſmore demanded payment of me by virtue of the award, he came to my

houſe in the country. I believe I was at dinner. He preſented the papers to me. Had thoſe papers conſiſted merely of the papers that were before the referees, I ſhould have examined them before I paid the money; but amongſt them was a general order, drawn by the broker in this buſineſs, Mr. Shoemaker, to pay the money, on demand, to the aſſured. On taking a curſory view of theſe papers in a body, and taking a particular view of the order drawn by the broker, I expreſſed my ſurpriſe to Mr. Paſſmore, that ſuch had been the reſult of the arbitration. He replied, I believe, that it might be matter of aſtoniſhment to me, but it was not to him. I then told him, that his opinion did not alter mine at all, and told him, that under all the circumſtances of the caſe, I thought it was moſt extraordinary. Seeing this poſitive order of the policy broker, and in whom we all do, and ought to put confidence, he ſigned a receipt, and I gave him an order to get his money.

Mr. DALLAS. I aſk Mr. Nicklin, whether when a converſation took place between the Underwriters and Brokers, as to the inducement for drawing the order, the underwriters did not cenſure the brokers, for drawing the order?

N. I believe they did, ſir. I think I was the moſt ſevere, becauſe I had confided in their attention to the buſineſs.

D. Did Mr. Bayard ever attempt to diſſuade the witneſs from paying the loſs?

N. He never did.

D. I wiſh the witneſs to ſtate, whether during the negociations in this buſineſs Mr. Bayard did not firſt ſuggeſt the reference to an amicable action?

N. That I do not know. But Mr. Bayard being the moſt active man in buſineſs, and acquainted with the nature of inſurance, we all confided in him,

D. What names preceded yours in ſigning the order drawn by Mr. Shoemaker?

N. I believe, Mr. Lyle and Mr. Crammond.

D. I aſk the witneſs whether the policy was ſubſcribed by Mr. Yard for any other than himſelf, and if ſo, for how many did he ſubſcribe, and whether Mr. Yard was employed by the houſe of which the witneſs is a partner?

N. I don't recollect any thing on this part of the ſubject Mr. Griffith may have employed Mr. Yard to ſign for him but I think it very unlikely. Mr. Yard and ourſelves were perfectly intimate at that time, and ſuch might have been the caſe; but I don't know that it is, and it appears to me extraordinary that ſuch a thing ſhould ever have been thought of.

D. I wiſh Mr. Nicklin to ſtate whether at the time Paſſmore preſented the award to him, he did not remark Mr. Pearce's not having ſigned it?

N. I don't know that I did, ſir. I know that in the buſineſs I depended very much upon Mr. Pearce's opinion.

D. I aſk the witneſs whether at the time Paſſmore called on him to procure his ſignature to the order, he communicated Mr. Bayard's diſſatisfaction to the witneſs?

N. I think he did not, ſir. Mr. Paſſmore appeared to be in a great hurry, and appeared ſomewhat agitated.

Mr. CRAMMOND—*ſworn.*

I was an underwriter on the policy of the brig Minerva, belonging to Mr. Paſſmore. Some time after he had heard of the loſs that had happened, he applied to me to have it adjuſted. I told him that my partner attended more than I did to buſineſs of this kind; but that I ſhould do every thing in my power to get a ſettlement of it. I perceived, from Paſſmore's converſation, that he was prejudiced againſt Mr. Bayard, as being adverſe to his claim. After ſome converſation with Mr. Bayard, I conceived there was no ground for the ſuppoſition; as Mr. Bayard was willing to acquieſce in the mode of ſettling the buſineſs by arbitration, and had ſaid that we ought to ſubmit it to a reference. Accordingly the diſpute was ſubmitted to referees, and Mr. Bayard was expected to conduct the buſineſs himſelf. It was during the time of the yellow fever, when gentlemen deviated a little from the uſual courſe of proceeding in policies of inſurance. I therefore was not very particular when Paſſmore called upon me. He came to my counting-houſe and exhibited the policy of inſurance and an award; but upon ſeeing it was drawn up by the broker, and the name of Mr. Lyle ſubſcribed to it; I conſidered that the referees had agreed; I accordingly ſigned the order. Some days after, Mr. Bayard expreſſed his ſurprize that I had ſubſcribed to pay the loſs, without firſt ſeeing him as the conductor of the buſineſs. I told him that I had ſigned the order from ſeeing it drawn in the hand-writing of Mr Shoemaker, ſigned by Mr. Lyle, one of the underwriters, and from a wiſh to accommodate the buſineſs as ſoon as poſſible.

MR. DALLAS. I aſk Mr. Crammond whether at any time before the agreement to enter into a reference Mr. Bayard attempted to diſſuade him from paying Paſſmore?

C. I have already premiſed that Mr. Bayard was diſpoſed to procure an amicable ſettlement rather than otherwiſe.

D. I aſk the witneſs whether the broker having given this order in his handwriting, was not cenſured for ſo doing, by all of the underwriters?

C. I do not recollect that I ſaid any thing to Mr. Shoemaker on the ſubject, but I was much diſpleaſed. For after hearing the circumſtances, and a particular account of the ſtate of the Brig, I would not have paid.

D. I wiſh Mr. Crammond to ſtate whether Mr. Yard ſubſcribed the policy for their houſe?

C. I believe he did. He was in the habit of ſubſcribing for us.

JAMES LYLE—sworn.

The policy of the brig Minerva, was underwritten by Mr. Yard, on my account, having a full reliance on his judgment, and having then no knowledge of inſurance, or of underwriting myſelf. When the loſs happened, I was applied to for payment—I do not recollect by whom. Some objections were ſtarted, and the matter was agreed to be left to reference. Mr. Haſlett, one of the referees, my moſt intimate friend, in whom I had, and ſtill have, the moſt implicit confidence, having ſigned the award with Mr. Henry, which was produced to me by Mr. Paſſmore—I told Mr. Paſſmore, that if Meſſrs. Shoemaker and Berrett approved of it, and would draw an order, I would ſign it, as I wiſhed to keep no man out of his money. Meſſrs. Shoemaker and Berrett did write the order for payment, upon which I immediately ſigned it.

Mr. DALLAS. I aſk the witneſs, whether in the converſation with Paſſmore, relative to payment on the award, that he obſerved to Paſſmore that "no honeſt man could now refuſe to pay!"

L. I don't recollect that I ever made uſe of the expreſſion. I was not ſufficiently acquainted with the buſineſs of inſurance at that time, to give ſuch an opinion.

D. I wiſh the witneſs to ſtate, whether, when he told Paſſmore to procure an order from Mr. Shoemaker, he did not expect that the whole of the proceedings had been fair and legal, and did he not rely upon Mr. Shoemaker's correctneſs?

L. It was his duty, as the inſurance broker—and I fully relied upon Shoemaker and Berrett's knowing that every thing was fair, juſt, and right, and that the amount of the award ought to be paid.

D. I aſk Mr. Lyle, whether Mr. Bayard ever attempted to diſſuade him from entering into an amicable action, or from ſettling off with Paſſmore.

L. Never.

Mr. DALLAS.

Here Mr. Speaker and Gentlemen of the Senate, we are willing to close the whole of the testimony in the defence, unless my worthy friend the Counsel for the managers will admit in place of the testimony of Mr. Pearce, the notes of that testimony as taken by Mr. Levy and myself, at the time he delivered it in the presence of the Supreme Court.

Mr. Passmore has wished it to be understood that his confinement was a principal cause of his bankruptcy. I have one single piece of paper in my hand, which without wishing to prey upon the feelings of an individual I will if necessary read to this honorable Court. It is a record of the judgments entered against Mr. Passmore in the office of Mr. Burd and will clearly and unequivocally evince that Mr. Passmore's embarrassments were deeply fixed before the commencement of this affair. We have also in possession, sir, the original proceedings and the surrender under the act of Bankruptcy. From these papers some inference might be drawn of the motives by which Mr. Passmore has been actuated, and it will appear that neither the sentence of the Court, nor his confinement did in any degree promote or accelerate his Bankruptcy.

I now proceed, sir, to the argument in this case and I do it with perfect confidence in the justice and candor of the honorable Senate who have heard the testimony. For let the issue be what it may, I feel a confidence that it will be a decision according to justice. I rely upon the fidelity of the public press, that a faithful record of the proceedings will be had, and that with equal fidelity all the transactions will be transmitted to posterity. Sir, I ask whether in the whole course of this testimony any proof has been adduced of gross misconduct, arbitrary oppression, or wilful violation of the law. If there is no proof of hostility to Mr. Passmore, of hostility to the laws, or as my worthy friend the manager has expressed, towards the rights of the Citizen, I ask in the name of common sense whether we ought to go one step further in this prosecution.

If, sir, the Judges had erred in their judgment and I will even say if they had transgressed the bounds of the constitution, they would not be subject to punishment unless it should appear that the error was wilful and manifest to themselves. Sir, it is the quality of our nature to commit error. It is the condition from which we receive life, and there is no state of civil society independent of it.

In the present case if an error had been committed by the Judges was there not a tribunal in the High Court of Errors & Appeals, competent to try the error & administer full justice. Any man who understands the principles of our laws knows

this, & I am ſure my learned friend the counſel for the managers, will never ſay that even an error upon conſtitutional ground is a proper ſubject of impeachment. Error is a fault of the judgment and not of the will. We will for the ſake of argument ſay that there was no action pending at the time that Paſſmore poſted the libel. I feel confident that the learned counſel with his candor as well as his learning will acknowledge that the conduct of the Judges would have been a queſtion of law and that the proper tribunal would have been the High Court of Errors and Appeals,—that if it was an error in judgment no impeachment can be ſuſtained. Was it not upon this very queſtion that Mr. Paſſmore's counſel told him that if there was no ſuit pending, the judgment was an error in law, and that a writ of error would furniſh ſatisfaction? That the Court of Errors and Appeals were a tribunal competent to review and reverſe the ſentence? If Mr. Paſſmore thought that there was no ſuit in Court at the time he publiſhed the libel why did he not conform to the opinion of his counſel and purſue the mode preſcribed? What was the reaſon that he did not apply for a writ of error? Becauſe, ſir, he knew that if the records were examined in the High Court of Errors and Appeals, the ſentence of the Supreme Court would be confirmed—that the Judges of the High Court of Errors and Appeals muſt pronounce upon their oaths, as the Judges of the Supreme Court did upon their oaths, that there was an action depending at the time. Again, ſir, let us ſay for a moment that the anſwers to the interrogatories were ſufficient to purge the contempt;—then the Judges of the Supreme Court in deciding that the anſwers did not purge the contempt have committed an error; but ſuch error comes only under the juriſdiction of the High Court of Errors and Appeals. It would be a queſtion of law,—and that Court would have the ſole authority to try it. Let us ſuppoſe, ſir, that theſe honourable gentlemen in the exerciſe of a benevolent diſpoſition, inſtead of immediately commanding puniſhment, gave Paſſmore an opportunity of making an atonement to Mr. Bayard, that it might have an effect in mitigation of puniſhment or of altogether diſpenſing with it; nay, even that they acted in this inſtance without a conſtitutional power,—what is it but a queſtion of law? There was no bribery, no corruption, no venality, no tyrannical or arbitrary diſplay of authority. It was therefore a mere point of law over which the Court of Errors and Appeals had juriſdiction.

Say for a moment that Judge Smith's obſervation "that Paſſmore's anſwers added inſult to injury," was unconſtitutional. I aſk, ſir, what Judge could ſit on the bench with honour to himſelf or the laws, when he was ſo trammeled up that he could not expreſs an opinion without expoſing himſelf to public ob-

loquy, and to impeachment. In ſuch a ſituation, ſir, he would be rendered a mere cypher, totally incompetent to the diſcharge of his official duties,—to exerciſe his legal judgment or his legal diſcretion.

All human actions muſt have ſome motive. None but ideots ever act without a motive. But, ſir, was there any motive in this caſe, independent of ſtrict juſtice, that could have operated on the minds of the Judges? If they had acted in a corrupt or arbitrary manner ſome fact proving their arbitrary diſpoſition would have been produced. But where, ſir, could have been their motives for acting contrary to their judgment? Thomas Paſſmore was unknown to them until he was brought before them, What motive could they have to oppreſs him. They could have no perſonal hoſtility towards him. It has been ſtated in the public prints, and I believe it is well known, that Paſſmore's politics were congenial with thoſe of the Judges, whilſt on the oppoſite ſide we ſee the partner firſt named in the firm, of the ſame political ſentiments as myſelf; ſentiments which I have always openly avowed, and which I truſt I ſhall ever ſupport. Then, ſir, I aſk what motive but the heinouſneſs of the offence and its conſequences to the community, could have operated on the minds of my venerable friends? All our penal code, ſir, ſpeaks in favor of a diſcretionary power being veſted in the hands of the Judges. The penal law gives a diſcretionary power in inflicting puniſhments correſpondent to the offence. In every ſpecies of crime the Judge ſhall pronounce ſentence agreeably to the enormity of the act. And there could be no motive for the Judges, in the preſent inſtance, giving any other than an honeſt, upright judgment, and award a puniſhment proportioned to the nature of the guilt. There could be no perſonal hoſtility as there is no evidence that Mr. Paſſmore was ever ſeen by the Judges antecedent to the rule to ſhew cauſe being aſked for. There certainly, ſir, was no colluſion as to ſociety, no vicious principle or motive,—no departure from conſtitutional duty. I ſay, therefore, upon what motive, and they muſt have acted from ſome motive, is this charge of arbitrary and oppreſſive conduct predicated? But no allegation of an improper motive has been offered.—No, ſir, nor does there appear the ſlighteſt evidence of an acquaintance or intimacy of Meſſrs. Pettit & Bayard with the Court collectively or the Judges individually. The Judges probably knew Meſſrs. Pettit & Bayard as merchants, as men of irreproachable manners and amiable life. They were not in habits of frequent intercourſe—perhaps never the intercourſe of a day, nor the exchange of a dinner. Where then, ſir, could have been the motive for this barbarous, rude and cruel deportment of the Judges to Mr. Paſſmore, againſt whom they could have had no perſonal hoſtility. In their time of life, ſir, give me leave to aſk the motive on which

they would forfeit their oaths and violate their characters in life, for the purpoſe of impoſing a fine of 50 dollars on Thomas Paſſmore.

Sir, I am confident that in theſe preliminary remarks, that the Senate will decide upon the merits of the caſe alone. I have a full confidence in their good ſenſe. I have nothing to apprehend as to a difference of party. No, ſir, you ſtand upon the ground of ſtrict juſtice, correct minds and upright conſciences—no private nor party paſſions can mingle in your deciſion, and even if you were not upon your ſolemn oaths I ſhould feel confident of an acquittal. And when I have heard it audaciouſly aſſerted that this would be made a party queſtion, I have not only ſaid that it was a diſgraceful and unwarrantable concluſion, but I have thought it impoſſible for poor human nature to be ſo degraded as to ſuffer the idea for a ſingle moment to exiſt.

Sir, there is not a ſingle inſtance in which it becomes neceſſary for the Judges to puniſh an individual, and where they decide with firmneſs, but they create an enemy. Theſe venerable gentlemen, in diſcharging the duties of their office, even in civil ſuits, where they muſt decide one way or another, are almoſt certain of creating enemies. The party who loſes the action is ſeldom ſatisfied, and we know that reſentments will ariſe. Is it to be ſuppoſed then, that with all the experience of years and matured judgment, they could at this time wiſh to act with partiality, at the riſque of character and of conſcience?

I will now, ſir, enter upon the argument, with the fulleſt confidence that all extrinſic matter will be diſcharged, and that the queſtion will be fairly taken upon the law and the conſtitution.

I now proceed to ſee, whether the Supreme Court, have a conſtitutional power, generally, to puniſh contempts.

In the ſcience of law, as in every other, it is of the greateſt importance to define terms with accuracy and preciſion. Permit me to ſay, what is the legal import of *a contempt of Court*. As I will endeavor to be accurate, and if no diverſity of opinion ſhall exiſt between the honorable counſel and myſelf, I am ſure his candor will induce him to declare it. The Engliſh dictionaries will tell us, that a contempt is a thing merely of a perſonal nature—an indignity to the man. But, ſir, when the word is engrafted on the law ſtock, it changes its import. It is not deſcriptive merely of *feeling*,—it then becomes deſcriptive of an *offence*. It becomes as much technical, as burglary,

ornation. If I was to call upon some gentlemen, and ask what was meant by burglary, they would probably say it was *breaking into a house*. But this is not the thing. No, sir, it is breaking into a mansion house in the night time, with a felonious intent. Now, sir, what, according to law, is the meaning of a contempt of Court. A Court, composed of individuals, respectable as to moral character, and as to private integrity. An individual, a libel upon their character out of Court, not in their official capacity, is left to the ordinary remedy of the law. But a libel upon a Judge for an act in Court, or any thing published for the purpose of operating on the fair administration of justice, is a contempt of Court, and it is punished, not for the sake of the personal feelings of the Judge, but that he shall be left free, and that the streams of justice shall be kept pure and uncontaminated. The Court must be respected—it is absolutely necessary to the administration of justice, and to preserve the rights of the people.

It is the duty of the Judges, in their moral capacity, collectively as a Court, to punish all attempts calculated to impede, to prejudice, or in any way to effect their decision. It is also their duty to see that every man for injury to his person or property, shall have remedy by due course of law. This is his constitutional privilege. If any Judge should refuse this remedy, impeach him, sir, and I should be happy to serve on the side of the prosecution.

Sir, if by any act, any one of the parties to a suit shall endeavor to deprive his antagonist of the due course of law, by infusing prejudice into the minds of the jury; by overawing counsel, or intimidating the witnesses, it is an infringement of the trial by jury.

A Judge is considered as a component part of the constitution, to take care that every man shall have his remedy by due course of law. A man is indicted for murder. He summons a witness to prove an *alibi*. The witness don't attend. If he has been served with personal notice, the Court will compel him to attend by attachment. The man comes into Court. He answers to interrogatories. He swears most solemnly that he never had any intention of treating the Court with disrespect, that he meant no offence to the Court—no contempt—nothing personal. I admit says he, that I received the summons, but I was obliged to go into the country on business. It is very true that this man is convicted of murder, but I have answered to interrogatories, I have purged the contempt, and am free! Are the Judges, upon this, to let him escape unpunished? Would this be paying regard to the due course of law? Even with respect to that process by attach-

ment, it is the right of the people. The Court have nothing to do with it so far as respects themselves. A Juror will not attend the public business, nor do any thing in the Court. Perhaps there is some obnoxious law that has produced a riot in the county. The Court cannot proceed without jurors. The business is kept in suspense. Is it not necessary that the Court should have a coercive power—a summary authority, to compel the juror to attend? Well the juror attends by attachment. He will say he meant no contempt of Court. And is this sufficient? Why sir, in the case of the non-juror, who not having taken the oath under the test act, said that he could not conscientiously take the oath,—he was punished. Here sir there was no intention to offend the Court—no thought of contempt. This was stated over and over again. I ask, sir, if in this case the offence was punished as if committed against the Judges? or whether it was not a right of the suitor—a right of the people, to prevent a stagnation of the streams of justice?

Among the various cases reported in our books of practice there is not one case in ninety-nine thousand, that a contempt is personally addressed to the Court. Suppose a man makes a noise to disturb the Court. What do they do? turn him out and get rid of him? If a witness prevaricates in giving his testimony, what do the Court say? "Mr. Attorney the man has prevaricated,—has perjured himself. You must take notice of it. We must punish him." Now this is not that the man commits any intentional offence against the Court, but such conduct operates against the proper administration of justice and ought not to be permitted. There is not one in ten thousand instances where the contempt is offered to the judges.

A suitor is to have his remedy by due course of law, and for this purpose the power of attachment is necessary. What is the effect, upon the administration of justice, of a witness not attending? In civil cases once, and even in criminal cases sometimes, the suit may be put off. But the suit generally cannot be put off a second time. The non-attendance of a witness may have the effect of totally impeding, or of diverting the regular course of justice. Just so, in case the non-attendance of a juror.

The honorable managers, and the committee of grievances can see a distinction between a civil and a criminal case, depending before the Court. Take it first, sir, upon the idea of a civil case, upon which your property is depending. Take the case lately decided in the Circuit Court, relative to the Springetsbury manor. Here the absence of a witness, or a juror, af-

fects mere delay. Now, ſir, I am to have full remedy by law—I am to have full ſatisfaction for all injury done to my property;—but if a man ſhall ſlander my reputation in a newſpaper, and aſſert that I am a perjured man, and a fraudulent dealer—all this ſhall be read with avidity—nay, he ſhall go further, and tell the Court and jury not to hear a ſingle word of what my counſel ſays—it is all nothing but mere ſophiſtry and eloquence. Suppoſe that on a queſtion of property, publications ſhould appear, tending to affect the right of the perſon who is entitled to it—to influence the jury, or the Court. The man is deprived of his property. He is ejected. He has his remedy, you will ſay, in another trial, but the ſame thing will be repeated. What is he to do? "O," ſay the gentlemen, "the remedy is plain, bring an action for damages." Againſt whom? Againſt the printer. When is it to be decided? Perhaps in 4 or 5 years. In the mean time, the printer perhaps becomes inſolvent. You cannot reach the author. You can only reach the printer, from whom you can get nothing. No man, but in deſperate circumſtances, will be guilty of ſuch conduct. The bankrupt act relieves the parties of all diſpute, on the ſubject of damages.

Now, ſir, I aſk if thus putting off a cauſe, and producing a delay which is fatal to juſtice; whether in a cauſe thus outraged and deſpoiled from the preſs, the injured party has ſuitable or ſufficient remedy in bringing his action for damages.

Shall it be as in the caſe of John Fries, that a printer ſhall denounce the counſel who ſhall endeavor to repudiate the teſtimony of the witneſſes, and endeavor to excite the Court to acts of hoſtility againſt the priſoner? Shall we be farcically told that we had only to wait until Fries was hanged, and the executors might get a compleat remedy in an action for damages? I aſk every honeſt and intelligent mind to diſcover a diſcrimination between a civil and a criminal caſe. Scarcely any offence can be greater than a libel, or ſcandal of a title to be tried in Court.

I contend, ſir, that the puniſhment of theſe kinds of contempts, is the right of the injured party, and conſequently that in every caſe where redreſs can be had, an attention to the feelings and ſituation of the injured perſon, is a primary conſideration.

It is upon principles of policy, conſtitutionally expreſſed that the party injured, or attempted to be injured in this way, ſhall have redreſs, and that the offender ſhall be puniſhed by attachment. Without this kind of remedy for ſuch contempts, trial by jury cannot exiſt. There would be no ſecurity for perſonal

property. We cannot have an impartial hearing before 12 men of the vicinage. I care not, ſir, whether there are 12 or 50, if they ſhall be ſo tampered with that they cannot view the caſe independent of prejudice or prepoſſeſſion, and I aſk the worthy gentleman, if he would be willing to truſt a cauſe upon ſuch a foundation. Sir, if that is the kind of trial by jury, that the conſtitution guarantees, it has been miſtaken by thoſe who framed it. It is high time to look about us. Permit me to ſay, not as a lawyer, but as a common member of ſociety, that if ſuch was the caſe, ſuch an individual as myſelf would not conſent to live in the territory a ſingle day more.

Though we have defined the offence and call it a contempt of Court, we muſt ſhew that it is derived from ſome legitimate ſource. Be not alarmed, Mr. Speaker, and I beg the honourable Senate to hear me out when I tell them that this ſummary proceſs is derived from the common law. Not in a ſtate of nature,—but in a ſtate of ſociety, where the people agree to ſurrender a part of their individual rights for the benefit of the community. It is upon principles of policy, that contracts are thus excited by a regard for the general protection of Society, and whatever law ariſes from this general aſſociation, let it be in France or Switzerland, is the common law. There muſt be an amplification of this law. Well, ſir, whether in France, Spain or Italy, or elſewhere, whatever grows out of this ſtate of Society is common law, and there is not a nation upon earth upon this principle that is without a common law.

Of the common law of England I ſhall produce a ſhort hiſtory—not from the dark ages of juridicial error nor from the learned juriſts of antiquity—not whether this digeſt of the accumulated wiſdom of ages originated with Edgar or Alfred, or was completed by Edward, the Confeſſor. It is the product of the united wiſdom of different countries for the purpoſe of preſerving the civil rights and perſonal liberties of the people, and no ſyſtem of law has ever been found equal to it. I turn with great pleaſure to a book written by Judge Tucker, an American, a firm Republican, a gentleman of great ſtanding in ſociety, and a learned civilian. After going thro an hiſtory of the origin of the common law, ariſing out of the diſcordant principles of the Heptarchy, he proceeds to ſtate the nature of the maxims and cuſtoms which compoſe the common law of England.

(See Appendix.—Note 1.)

Now ſir this is the compoſition of the common law as it reſpects England. And I ſhall bye and bye ſhew how it was eſtimated by modern legiſlators. You will ſee that not one ſi-

ty-thousandth part of the rights of property are secured without referring to the principles and maxims of the common law of England. That common law, sir, is a part of the law of—Pennsylvania, so declared by legislative acts and by repeated judicial decisions.

We will now look at a work recently published, where Judge Wilson, in terms the most eloquent, speaks of the wisdom and advantages of the common law. But I cannot mention the name of Judge Wilson, without saying, that to him, more than to any other man in Pennsylvania we are indebted for the democratic features of the government. You Mr. Speaker, who was a member of the convention, know this to be the case. I was only an auditor, but I well recollect that the provisions for guarding the liberties of the people, and for establishing the Senate and the Governor were in a great measure inserted at the instigation of Mr. Wilson, supported by great talents and perspicuity.

"*Of the common law.*

"Sapientissima res tempus," says the profound Lord Bacon, in one of his aphorisms concerning the augmentation of the sciences—Time is the wisest of things. If the qualities of the parent may, in any instance, be expected in the offspring; the common law, one of the noblest births of time, may be pronounced the wisest of laws.

"This law has, at different times, and for different reasons, been denominated by different appellations. It is sometimes called, by way of eminence, the law of the land, "lex terræ." At other times, it is called the law of England. At other times again, it is called the law and custom of the kingdom. But its most general and best known appellation is, the common law. Various are the reasons, which have been assigned for this appellation: the best seems to be this—that it is the common municipal law, or rule of justice; the law which is described in the code of king Edward, the elder, as expressing the same equal right, law, or justice, due to persons of all degrees.

"The term *common law* is not confined to the law of England: It is not, says Sir Henry Finch, a word new and strange, or barbarous, and proper to ourselves, and the law, which we profess, as some unlearnedly would have it: it is the proper term for other laws also. Euripides mentions the common laws of Greece; and Plato defines common law in this manner; that which, being taken up by the common consent of a country, is called law. In another place, he names it, the golden and sacred rule of reason, which we call common law.

"This place, continues the ſame author, in his diſcourſe of law, is very notable: It opens the original and firſt beginning of the common law: it ſhows the antiquity of the name; it teaches common law to be nothing elſe but common reaſon—that refined reaſon, which is generally received by the conſent of all.

"We have now brought the hiſtory of the common law down to the period of the Norman conqueſt. We have ſeen its riſe taking place, by ſlow degrees, in ages very remote, and in nations very different from one another. We have ſeen it, in its converging progreſs, run into one uniform ſyſtem, mellowed by time, and improved by experience. In every period of its exiſtence, we find imprinted on it the moſt diſtinct and legible characters of a cuſtomary law—a law produced, extended, tranſlated, adopted, and moulded by practice and conſent."

How ſtands the caſe in Pennſylvania? I repeat, ſir, that in Pennſylvania we ſhould have no ſecurity for our perſons, our property, our reputation, and the regular proceedings of Courts of juſtice, without the common law. Sir, the conſtitution of Pennſylvania would be a dead letter without the expoſitory power of the common law. That conſtitution ſays that "every man for injury done him in his property perſon, or reputation ſhall have remedy by the due courſe of law," and I aver with confidence that this proviſion can never be of any avail without the auxiliary of the common law. All wants are to be ſupplied,—all grievances redreſſed,—but how are they to be redreſſed? Unleſs it is left to the common law to expound, it is utterly unintelligible and impracticable. Suppoſe a man attempts to put you out of your eſtate by "due courſe of law," How is he to attempt it? By the common law. How are you to defend your eſtate? By the common law. How are we to get ſatisfaction for an aſſault and battery? By the common law. Suppoſe a man libels my reputation, the deareſt thing in life,—nay, the man who does it, does ſomething worſe than take from me my life. How am I to ſeek for redreſs? By the common law. There is no act of aſſembly for it. It is only the common law that entitles me to redreſs.

Of the great crimes, too ſir, where are we to get a deſcription of them but by a reference to the common law. There is no caſe in which the Legiſlature have interfered but in that of murder, and in that it was only as to defining the degrees of the offence. But ſir after this deciſion of the Legiſlature, after the offence is deſcribed, we are then obliged to go into the common law.

What is the common law, then, compoſed of here? The gentlemen who has been employed on the part of the proſecution will own that it is a general ſyſtem comprehending all that belongs to ſociety—for the protection of their individual rights and the common welfare; and yet of ſo contrary a nature is the common law of Pennſylvania that in many inſtances it embraces the common law of other nations—the law of every language in the univerſe. If a man enters into a contract in the Eaſt Indies where the intereſt on money extends by law to ten per cent. If a diſpute and a trial takes place in this country, the 10 per cent is allowed although it is contrary to our own law. In marriage contracts, which are different in France and in England, the law of the country where the contract is made becomes a part of our common law. The ſame rule applies to actions upon bills of exchange and policies of inſurance. Even for offences againſt the laws of nations there appears to be no fixed proviſion but the common law. We have no mercantile law.

If, ſir, this comprehenſive ſyſtem of common law belongs to Society. If is impoſſible to preſerve order without it, is it not eſſential that we ſhould have ſome means to comprehend, to aſcertain and to define it? Great muſt be the time, labour and induſtry neceſſary for this purpoſe; and you muſt not be ſurprized that at this time of day a profeſſion ſhould be ſet apart to make it their ſtudy—and that ſuch profeſſional men cannot make a watch, make a ſhoe, or make a coat.

The Judges are bound by the conſtitution to adminiſter the common law. Our government is not old enough to make a common law for us—and we adopt ſo much of the common law of England as is eſſential.

But how is a knowledge of the law to be acquired? Muſt we not like other perſons look for the object where it is to be found? Whence then the hue & cry about Britiſh authorities? Muſt we not look into the books where the law is regiſtered, whether they come from England or France? How are we to find it but by reſorting to thoſe *bated* and *exploded* volumes?

With pleaſure I now refer to an authority which I truſt will meet with attention and reſpect. The Legiſlature of Virginia, wiſhing a general reviſal of their laws, they appointed Mr. Jefferſon one of the Committee for this purpoſe, Judge Pendleton another, and a third whom I don't recollect. The work was executed and reported by theſe three gentlemen. Mr. Jefferſon afterwards, in his notes on Virginia, in his anſwers to certain queries put to him by Mr. Marbois, a foreigner of diſtinction, ſpeaks thus of the principles upon which they grounded the reviſal.

Jefferson's notes—page 266.

"The plan of the reviſal was this. The common law of England, by which is meant, that part of the Engliſh law which was anterior to the date of the oldeſt ſtatutes extant, is made the baſis of the work. It was thought dangerous to attempt to reduce it to a text: it was therefore left to be collected from the uſual monuments of it. Neceſſary alterations in that and ſo much of the whole body of the Britiſh ſtatutes, and of acts of aſſembly, as were thought proper to be retained, were digeſted into 162 new acts, in which ſimplicity of ſtyle was aimed at, as far as was ſafe."

Now, ſir, we have the authority of Mr. Jefferſon the great and worthy Executive Magiſtrate of the United States. He tells us that it was thought dangerous to reduce it to a text, it was therefore left to the uſual monuments. I am confident that gentlemen will not diſpute this kind of authority.

Having ſhewn what is the opinion of Mr. Jefferſon, a man of ſcience, a patriot and a lawyer, I ſhall now turn to Judge Blackſtone a warm and deciſive ſupporter of Jury Trial. In his commentaries page 68, in the ſequel of the paſſage,

"For it is an eſtabliſhed rule to abide by former precedents, where the ſame points come again in litigation; as well to keep the ſcale of juſtice even and ſteady, and not liable to waver with every new judge's opinion; as alſo becauſe the law in that caſe being ſolemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breaſt of any ſubſequent judge to alter or vary from, according to his private ſentiments: he being ſworn to determine, not according to his own private judgment, but according to the known laws and cuſtoms of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

In page 71, I will read a ſhort paſſage, ſupplementary to the one I have juſt read:

"The doctrine of the law then is this; that precedents and rules muſt be followed, unleſs flatly abſurd or unjuſt: for though their reaſon be not obvious at firſt view, yet we owe ſuch a deference to former times as not to ſuppoſe they acted wholly without conſideration. To illuſtrate this doctrine by examples. It has been determined time out of mind, that a brother of the half blood ſhall never ſucceed as heir to the eſtate of his half brother but it ſhall rather eſcheat to the king, or other ſuperior lord. Now this is a poſitive law, fixed and eſtabliſhed by cuſtom, which cuſtom is evidenced by judicial

deciſions; and therefore can never be departed from by any modern judge without a breach of his oath and the law."

"Upon the whole, however, we take it as a general rule, "that the deciſions of the Courts of juſtice are the evidences of the common law."

Although, ſir, the judge may even conſider the precedent to be an improper one, yet if it is not flatly abſurd or unjuſt, he has no right to depart from it.

Now, ſir, the next ſtep that I ſhall take is, to convince this honourable Senate that the common law views Thomas Paſſmore's offence as a contempt and puniſhes it with fine and impriſonment. In the fourth volume of Tucker's edition of Blackſtone the doctrine upon this ſubject is laid down. Now, ſir, I beg leave to premiſe that whenever a commentator is commenting on a legal poſition, if he does not imply his diſſent, it is to be preſumed that it meets his approbation. Wherever Judge Tucker has conſidered the text as not applying to the ſituation of this country, he has endeavored to ſhew how far it is inapplicable. In the preſent caſe therefore as Mr. Tucker is ſilent on the ſubject we have a right to ſuppoſe that it receives the ſanction of this able and diſtinguiſhed lawyer.—*See Appendix, notes* C. & D.

You will find ſir, the authority of puniſhing contempts confirmed to the Supreme Court—particularly thoſe contempts committed by parties to any ſuit or proceeding before the Court,—and we are told that the proceſs of attachment for thoſe and the like contempts muſt neceſſarily be as ancient as the laws themſelves.

Here, ſir, give me leave to intrude one idea, that however the terms legiſlative, executive and judicial may be conſidered, the Britiſh Magna Charta or bill of rights does as explicitly provide for a fair trial by jury as the poſitive terms of our own conſtitution. That conſtitution is merely declaratory.

I will proceed a little further, ſir, because I wiſh to give the honourable Senate ſome general idea of the nature of attachments for contempt. 4th Blackſtone 286—7. *See Appendix note*, Z.

"That they ſhall make a rule on the party to ſhew cauſe why an attachment ſhould not iſſue, or the Court makes abſolute the original rule,"—"and when there, he muſt either ſtand committed, put in bail, in order to anſwer interrogatories for

the better information of the Court, with reſpect to the circumſtances of the contempt."

Here, ſir, permit me to ſay that this is the ground upon which I faced the argument with my friend Mr. Levy, that it was not my duty to file interrogatories. It was neceſſary for the party to demand them. "Theſe interrogatories are in the nature of a charge, and if any is improper the defendant may refuſe to anſwer." "If the party can clear himſelf upon oath he is diſcharged, but if perjured, may be proſecuted for the perjury." Now, ſir, here is an inevitable proof that the anſwer to the interrogatory muſt be ſuch an anſwer as to meet it directly. It is only by a poſitive denial that the contempt can be purged; and if the party in ſuch denial ſhould perjure himſelf he is ſubject to a proſecution for it. "If he confeſſes the contempt, the Court will proceed to correct him by fine or impriſonment, or both."

Such, ſir, are the elementary arguments and ſtatements of this learned commentator, and you will find that in every caſe it is the common law that gives the only remedy. Poor and frail indeed would be the ſecurity for our property, if the Courts were diveſted of this power. This mode of proceeding by attachment applies not only in caſes where the contempt is directed againſt the perſon, but where it is directed againſt the ſubject in diſpute, and, as I ſhall hereafter ſhew this honorable Senate, is warranted by expreſs acts of Aſſembly.

In 3d Hawkins, book 2d, page 272, we have an expoſition of the nature of attachments, and of the diſcretionary power of all Courts of record to uſe them, and particularly the Court of King's bench. *See appendix—note* E.

Sir, in the ſame book, page 6, it appears that even in a Court-leet, the ſteward has the power to fine and impriſon for diſorderly behaviour—*See Appendix, note* F.

Again, ſir, in page 176, we find the Sheriff's Court in poſſeſſion of this power. *See Appendix, note* A. A.

Theſe may be conſidered as referring to out-door contempts and I do not ſuppoſe that in this defence I ſhall be able to make a diſtinction ſuitable to the idea of the honorable manager, relative to the contempts committed out of doors and thoſe committed in the immediate preſence of the Court, ſince the Committee of Grievances in their report have already determined it. But ſir, while I thank the gentlemen who made the report, I muſt expreſs my aſtoniſhment at that part of their deciſion, where they ſay, however willing the committee may

be to concede that every Court of Juſtice neceſſarily poſſeſs the power of puniſhing contempts committed in their preſence and whilſt in ſeſſion." &c.

Sir, this is not an expreſſion at which I venture to complain. But, ſir, the explanation furniſhes a poſition, at which common ſenſe revolts. Suppoſe, then, that the contempt is committed at the laſt hour of the Court, and that the Court is to adjourn in five minutes. If it is an offence, it ought to be puniſhed promptly; and, yet it would be found in almoſt every inſtance impoſſible to do it. Where then would be the power which the committee of grievances have been ſo liberal as to allow? What is the use of their ſummary proceſs?

On the part of the committee of grievances, and on the part of the Houſe of Repreſentatives, there has been over and over again an exerciſe of this ſummary jurisdiction.

But, ſir, the paſſage of which I complain in the report of the committee of grievances, is this—"Upon the whole, your committee cannot but reiterate their opinion, that the proceeding of the Judges in this caſe, is unprecedented in the annals of juriſprudence."

Not even in the annals of Pennſylvania, with the caſe of Eleazer Oſwald full in their view, can they find a parrallel.

But it goes further and ſays, that "nothing ſimilar is to be found in any other country, where law, and not the arbitrary will of the magiſtrate is the governing principle."

Now, ſir, tho' I do moſt ſincerely agree with thoſe gentlemen in advocating republican government and in the opinion that the law and not the arbitrary will of the magiſtrate ſhould be the governing principle, yet I do not think that we ought to ſuffer ourſelves to be led away by enthuſiaſtic and viſionary prejudices. Sir, the mere name of monarchy has nothing dreadful to preſent to my mind, on account of its being a monarchy. If I find ſecurity of property, of perſonal liberty and reputation, I care not ſo much for the name of the government. However we may repudiate a Monarchy, a Houſe of Lords and a Houſe of Commons, with their feudal errors, and an unfair repreſentation of the people, yet there never was, nor I think ever can be, a more refined or perfect ſyſtem of common law, than in England. Every man muſt acknowledge, that the preſervation of that monarchy has been owing to the purity of their adminiſtration of juſtice.

The revolution in France treated in the minds of a portion of the people of England a hope that they could effect a reform in their own country. Society upon ſociety was eſtabliſhed, and meetings held in various parts of the kingdom, and more particularly in the neighborhood of London. The miniſter received regular intelligence of all their proceedings from his ſpies and informers; for ſuch is the art of the ſyſtem of *eſpionage* in that country, that nothing of this kind can paſs unnoticed. When the miniſter thought he had collected enough, he proceeded to make a public charge. It was not to the nation at large that he wiſhed to make it. But, on his ſuggeſtion, a committee of ſecreſy were appointed and ſat on the ſubject. This committee reported that there did exiſt a treaſonable conſpiracy to ſubvert the government, and a ſpecial commiſſion was iſſued to try perſons engaged in it. As ſoon as this was adopted, the Houſe of Commons and the Houſe of Lords addreſſed the king on the ſubject, and recommended immediate and ſummary puniſhment. Here was a combination of the Executive, and a declaration of the legiſlative branch of the government, not that theſe men ſhould be put upon their trial, but that they ſhould be puniſhed. Notwithſtanding this they were put upon their trial, and acquitted;—and ſuch diſpleaſure did this acquittal give to the combination, that even after that acquittal, a member of the Houſe of Commons obſerved in the Houſe that he conſidered them only as *acquitted felons*. Look at the charge of Chief Juſtice Eyre on that trial. I think that the ſincereſt friend to liberty could not from the moſt exact ſcrutiny diſcover any thing of bias or prejudice. His conduct was upright and dignified. Not a ſingle word did he utter that would not bear the teſt of ſtrict propriety and impartiality. And notwithſtanding the zeal of the miniſtry, and the declarations of the legiſlature, the jury-box, in oppoſition to the views of the government, pronounced a verdict of acquittal. Thus we ſee, that even in a monarchy, with all its appendages of power, the trial by jury remains inviolate. I think therefore, ſir, that the honorable committee of Grievances might have known that it was a part of wiſdom, to learn, even from an enemy, and I alſo think that they might have found precedents even in England, where, as I ſhall have occaſion to ſhew, the law, and not the will of the magiſtrate is the governing principle, in all legal matters. They might have found precedents, and could not have been at a loſs for information, ſequeſtered as the legiſlature is by a removal from Philadelphia, unleſs it be for the want of books.

Adjourned.

SAME DAY, *P. M.*

Mr. DALLAS in continuation.

On a ſingle point connected as an atom with the univerſe, I called your attention to the purity of the adminiſtration of juſtice in Great Britain. So far as reſts with me, ſir, I feel as you do with reſpect to the practice of their government; but I thought it my duty to ſnatch the opportunity of rendering juſtice to the country, relative to the pure adminiſtration of law. Perhaps this was not ground in ſupport of the judges; but being confident of their acquittal, I ventured to take ſuch latitude. Sir, under the ſame impreſſion, I was about to cloſe my obſervations on the common law. However in another point of view, as this queſtion will be intereſting to the country generally, the commentary will not be loſt; and I wiſh to lay the buſineſs before the Senate, in ſuch a way, that no man, who reads law, or not, can heſitate or be miſtaken.

I ſtated my ſurprize at the declaration of the committee of Grievances, "that of a caſe like the preſent no precedent could be found in the annals of our juriſprudence;" and I ſtated that though in a monarchy, where the political privileges of the citizen may be abridged, yet ſo far as reſpects the law, the adminiſtration of it is pure, unſullied, and does honor to the nation. Let me not be miſunderſtood. I am peciſely with the Senate, ſo far as reſpects the ſyſtem of government.

I have ſhewn from the text of Mr. Blackſtone, and the Commentary of Judge Tucker, the reaſon of the common law; its application to this country; and the principles of ſummary proceeding. I will now go into detail, and will proceed to ſhew from the authority of one of the greateſt men that ever adorned not only England, but even the human race, that the law of attachment applies as well to contempts committed out of the view of the Court, as to thoſe committed within the view of the Court, and that the contempt muſt be purged by a denial of the fact, and not by an evaſion of the charge. I will afterwards prove that theſe principles are recognized in Pennſylvania.

Permit me, ſir, to read theſe books, not even on this ſingle point but on the whole ſubject generally, and I truſt I ſhall be able to ſhew, beyond all manner of queſtion, that the conduct of the Judges was warranted by known and acknowledged practice, not only in England, but in this country.

2d *Atkin's*, 469. This the honourable Senate will pleaſe to obſerve is in a Court of chancery. It was in thoſe days

when the adminiſtration of juſtice in the Court of chancery was as pure as in any other Court of juſtice, and they acted upon the known principles of law. *See Appendix, note* G.

I pray the Senate to recollect the latter part of the accuſation ("taxing them with turning affidavit-men, &c. in the cauſe now depending in this Court,") as I mean to compare it with the conduct of Thomas Paſſmore, and to ſhew how pointedly it bears upon it.

This deciſion was by Lord Hardwicke, of whom the whole world ſpoke in approbation, as a learned and upright judge, in whoſe whole judicial career, not one of his decrees was ever reverſed. From this high and reſpected authority, who will ſhine, as I ſaid before, in the annals of the human race, we have the very doctrine that we contend for, laid down in language that cannot be miſconſtrued.

The next authority is *Peere Williams*, 675. *See Appendix, note* R.

Sir, it has been inſinuated, nay more than inſinuated by the honourable manager and the counſel, that the judgment as entered in the prothonotary's office, extinguiſhed the ſuit. Now in this very caſe the contract is declared to be final. "In the ſpiritual Court it was adjudged to be a good marriage, and the ſentence affirmed by the delegates; but affidavits might come in to induce the Court to grant a new trial." Now gentlemen, here you have a preciſe caſe. Sir, if I had been addreſſing you upon the ſubject, could I have uſed language in the caſe of Pettit and Bayard that would have been more appropriate? And pray, ſir, do me the honor to attend to this paſſage; "and though the intention of the perſon adverti ſing may be innocent, (and I knowing the man believe it was ſo, inſomuch that if a Court may be ſaid to have inclinations, or impreſſions from thence, I muſt own, I ſhould be influenced by my knowing Mr. Pool to be an honeſt man) yet the juſtice of the Court, nay the juſtice of the nation being concerned in ſo public a caſe, I cannot diſmiſs the party, though his counſel offer to pay coſts to the other ſide, but in juſtice, and for example's ſake, he muſt ſtand committed."

I implore this honourable Senate to recollect this laſt paſſage. Here the thing was completely at an end. The marriage was brought to a concluſion in an original Court, and in a Court of appellate juriſdiction. A man publiſhes an advertiſement offering a reward for witneſſes to repudiate the marriage. The Court preſume that his motives are good. They ſay that he is honeſt, and yet for the ſake of the

adminiſtration of juſtice, at the very moment that he is eulogized, he is committed.

2*d Vesey*, 520. *See Appendix*, H. *page* 10. Now, ſir, what is the effect of that caſe. Here, ſir, we find that the party injured and the public juſtice go hand in hand. The puniſhment was not only for the ſake of the party injured by ſuch advertiſement, but for the ſake of public juſtice.

2*d Atkins*, 488. *See Appendix*, D. D. *page* 39. In the principle of this caſe we find the doctrine of contempts particularly recognized. Here it appears that the act was innocently done; that in the long vacation, he was adviſed by the maſter to print the order, with a view to prevent any improper payment on the part of the tenants. It is the officer of the Court who gives the advice; and yet the Lord Chancellor, not only diſcountenances the practice, but the intimation is plain that nothing but the particular circumſtances of the caſe, and the certainty of there being no improper intention, whatever,—nothing to obſtruct the courſe of juſtice,—could have operated on the Court in forbearing to puniſh it as a contempt.

3*d Atkins*, 564. *See Appendix*, *page* 30, *note* U. Here, ſir, the plaintiff and defendant were partners in trade. A decree in chancery had been paſſed for a receiver to collect in the partnerſhip debts. Harwood is preſent at the time of paſſing the decree. He then diſpoſes of ſome of the partnerſhip property and becomes bankrupt. This is declared to be a contempt, and he is committed to the Fleet. The point on which this caſe turns is this, that a man being in Court, and hearing what paſſes there, is bound to take notice of it. And you will perceive, ſir, how ſtrongly it bears upon the ſituation of Thomas Paſſmore at the time that he publiſhed the libel. I will only now ſay, that Thomas Paſſmore was preſent in the Supreme Court when the execution was ſet aſide, and when a rule was obtained for taking depoſitions in the cauſe between himſelf and Meſſrs. Pettit and Bayard.

I am now, ſir, going to read a caſe which will cover almoſt the whole ground of our preſent queſtion. This honourable Court will now perceive that I go from a Court of chancery, to a Court of common law. 2*d Burrows*, *page* 792. *See Appendix*, *page* 14, *note* K. The fact charged againſt Beardmore was that he did not comply with the judgment of the Court, which required that the priſoner ſhould ſtand in and upon the pillory. There were no particular directions that he ſhould ſtand ſo and ſo. This was known by long cuſtom and the manifeſt intentions of the Court. But whether he ſtood

ſo and ſo, or not, Beardmore was puniſhed, becauſe he did not fully anſwer the interrogatories, and purge the contempt by a poſitive and direct denial of the charges. This honourable Court will ſee, that although fourteen or fifteen affidavits, proved that the priſoner ſtood in the uſual and ordinary manner, and although it was poſitively ſworn, that he had no ſort of deſign or intention directly or indirectly to favour the priſoner, or to offend the Court, yet as he did not deny every charge, it was not conſidered as a purgation. You muſt either deny thoſe facts, or the law of the land will convict you; and his honor Judge Smith, muſt feel great conſolation in the expreſſion of Lord Mansfield, that the attempt to juſtify the legality of the execution was an *aggravation*.

Now, ſir, you will ſee from the caſe what is the conſequence, or nature of purging interrogatories. You muſt meet the fact; for it will not do to ſay that you thought it was the ordinary way of executing the ſentence, or that you had no deſign or intention to offend. No more than in a proſecution for larceny, a man ſtealing a horſe tells you that he did not mean to ſteal, but to borrow,—or in a caſe of homicide that he did not mean to kill, but to beat. No, ſir, the anſwer muſt be full, and compleat, and muſt meet the fact.

The next caſe that I ſhall read, is 1*ſt Wilſon's Reports*, *page* 75. *See Appendix*, *page* 49, *note* T. T. I have no doubt, ſir, but the propriety of this deciſion will be admitted. The Court granted the attachment for threatening a proſecutor in a cauſe with danger of his life. Had Paſſmore made threats of this kind, or had he met his antagoniſt in the field, or had he met him in the ſtreet and ſtabbed him, the ſtab would not have been more cruel or malignant than the attempt to deſtroy his reputation and his credit.

Hardwicke's cases, 225—*another edition*, 237. *See Appendix*, *page* 14, *note* I. Sir, I ſtop here for a moment to call to the recollection of the Court to the ſuit between Pettit and Bayard and Thomas Paſſmore. Now although Pettit and Bayard were originally and immediately concerned in the action, and although the libel was immediately directed againſt them, yet by this authority it plainly appears, that as it was a contempt. Not only Mr. Bayard had a right to bring it into view of the Court, but a ſtranger might do it. Might not Mr. Lyle have done it? Much more, all the underwriters, parties concerned in the event of that ſuit had a right to come into Court and demand judgment againſt Paſſmore. It was not a queſtion at all, with reſpect to Meſſrs. Pettit and Bayard. It was to puniſh the man who had attempted to obſtruct the clear adminiſtration of juſtice.

Now, ſir, this honorable Senate will perceive why the parties in this caſe did not purge the contempt. "The reality of the debt does not make a material difference, if the action is brought in deceit of the Court, for then the debt, *though due*, will be taken to be but a *pretence*, and the *abuse of the Court* the ſame." Here we have alſo in this caſe, an additional proof, that the interrogatories are for the benefit of the defendant—and that the proſecutor need not furniſh them, unleſs called for. The defendant is not obliged to anſwer. He may demur to an improper interrogatory. He cannot be bound to anſwer in any thing that will involve him in a penalty.

Sir, as I ſeem ſomewhat exhauſted, and as it may be about the uſual time of adjournment, if the Senate think proper, I will here ſtop for this time——[a pauſe]——or I will proceed to read from 4th term reports—402—

[On motion, the Senate now adjourned until to-morrow morning, at ten o'clock.]

WEDNESDAY, January 16, 1805.

Mr. DALLAS—in continuation.

Independent of the importance of this cauſe, ſir, I feel a ſolicitude that it ſhould be fairly delineated. It muſt be plain even to thoſe never acquainted with law reading, that the authorities which I have already adverted to, are pointed and concluſive. I ſhall, however, proceed to give additional proof.

I was endeavoring to eſtabliſh the principle that this mode of ſummary proceſs in the puniſhment of contempts, was an inſtrument of common law. [Here Mr. Dallas read a caſe in *4th reports page* 402, *(Hoskins* vs: *Lord Berkely)* in which the trial of a feigned iſſue, without the conſent of the Court, was deemed to be a contempt. He alſo read ſome extracts from 3d Brown's parliamentary caſes, pages 84, '5 '6 '7 '8. It was the caſe of Charles O'Hara, *appellant*, and Tully O'Neal, *respondent*, firſt brought before the court of chancery. It was ordered by the maſter in chancery, that the appellant ſhould aſſign over, and deliver a certain leaſe to the reſpondent, or to Brinſley Butler, Eſquire; the reſpondent at the ſame time giving the appellant ſufficient ſecurity for his indemnity, on account of the ſaid caſe, and paying to the appellant a certain ſum of money. The appellant was ſerved with a copy of the writ of execution of this decree, and at the ſame time the reſpondent tendered an engroſſed parchment writing, importing an aſſignment of the ſaid leaſe to Brinſley Murray, and alſo

ſhewed the reſpondent ſome bags of money, which he ſaid was the conſideration money mentioned in the ſaid writing, and offered to pay the ſame, if the appellant would then execute the deed; but the appellant not having previouſly read, or ſeen the ſaid deed, or any draft or copy thereof, nor he, nor any perſon in his behalf, having been adviſed with in preparing and ſettling the ſame, as in ſuch caſe is uſual, and the appellant obſerving that ſeveral improper covenants on his part were inſerted therein, and that no allowance had been made to him for certain intereſt money that had been decreed to him; he refuſed to execute the deed—the reſpondent refuſing to pay the money, unleſs the appellant would execute the deed, went away abruptly, and he, or any perſon on his behalf, never afterwards paid or tendered one farthing of the money, though he then was, and for three years before had been in poſſeſſion of the lands, and enjoying the full benefit of the leaſe.

The 27th of Auguſt, the Lord Chancellor ordered that an attachment ſhould iſſue againſt the appellant, and that the intereſt of his money ſhould ceaſe from the time of the tender, unleſs cauſe ſhewn in ten days. The appellant on the 17th of September following, ſhewed for cauſe, the irregularity of the tender; but his lordſhip was pleaſed to order, that an attachment ſhould iſſue againſt the appellant, unleſs he ſhould execute to the reſpondent, an aſſignment of the leaſe in ten days, without further motion. On the 8th of October, this laſt order was made abſolute, and the appellant was accordingly charged with an attachment; and it was then alſo ordered that the intereſt of his money ſhould from thenceforth ceaſe.

Two motions were afterwards made for the Court to diſcharge the ſaid orders, and alſo the attachment, ſo that he at leaſt might have his liberty; but he was denied any relief, and the affidavits, proofs and papers of the appellants were refuſed to be read.]

I will now proceed to read another authority. Sir, it is Iriſh. And, however the authorities of the Engliſh books may be deſpiſed and ſneered at, I have not yet heard that Iriſh authorities have gone out of faſhion. This is Iriſh term reports, (Vernon and Scriven) page 295. So far, ſir, as reſpects queſtions of property, the tribunals of Ireland in their deciſions have imitated the principles of thoſe of England. [Here Mr. Dallas quoted the opinion of Lord Earlsfort, Chief Juſtice, in the caſe of *the King* vs. *Read*, to ſhew that it was not the duty of the proſecutor to furniſh interrogatories; and that where the defendant ſubmits to an attachment, the proſecutor has not a right to exhibit the interrogatories to him—and that an attachment might be made abſolute on an affidavit only. Lord

Earlsfort, in giving his opinion, referred to *Hardwicke's cases*, 150, where it appears that "Lord Hardwicke attached the defendant upon his affidavit to ſhew cauſe; but, (as in this caſe) the attachment was let to remain in the ſheriff's hands for a week, to give the party an opportunity of making an atonement, if he choſe it." Mr. Dallas alſo quoted from the ſame book, 299—Lord Annely's note in the caſe of *the King* vs. *Mauclerk*, *E.* 1776, the following—"We held that the defendant has a right, (where he does not ſubmit to the attachment, and in order to exculpate himſelf) when he appears in cuſtody, to put a rule on the proſecutor to file perſonal interrogatories againſt him; but, that it could not, and ought not to be done on the part of the proſecutor.]

Here, ſir, you have the doctrine in plain and ſimple language, not in ſtudied compoſition, but in a manner which does not require legal knowledge to comprehend it. The party who has ſuffered an injury, makes oath of that injury, and aſks for a rule to ſhew cauſe why an attachment ſhould not iſſue. But, as in every caſe, there may be circumſtances to mitigate, if not entirely to diſmiſs the accuſation, the defendant, if he thinks proper may aſk for interrogatories. He may be able to ſtate circumſtances that may induce the Court to alleviate the puniſhment, or to render it unneceſſary to make the rule abſolute. But if his anſwers are evaſive, or if, as in the caſe of Paſſmore, they are an aggravation, he had certainly better be without the interrogatories. And well might Mr. M'Kean in that caſe ſay to the oppoſite counſel, "remember it is you, and not us that call for them." We mean not to eſtabliſh an inquiſition to oblige a man to confeſs his own guilt. No, ſir, it is the intereſt of the accuſed to call, or not to call for interrogatories. If he denies the fact charged, and ſwears poſitively that he is not guilty, then, although the groſſneſs of the affidavit may be partly apparent, yet, unleſs it contains ſomething extremely abſurd, and that cannot poſſibly be believed, he muſt be cleared, notwithſtanding the teſtimony of fifty thouſand witneſſes. But, ſir, he muſt deny all. Paſſmore was charged with publiſhing a libel againſt a party in an action pending before the Supreme Court. Inſtead of denying this, he inſiſts on the truth of the publication, and tells you that he didn't mean any perſonal contempt againſt the Judges. But this will not do, ſir. No, he muſt make a full and flat denial, and the denial muſt be ſuch as to remove all danger of injury. But, inſtead of this, he acknowledges that he publiſhed this attrocious libel, calculated to agitate the public mind, to deſtroy the fair reputation of two gentlemen, and to taint the ſources of juſtice. He ſays it is true I publiſhed that libel, but I meant no inſinuation againſt the Court, or the Judges. Does this deny the fact, and does this ſimple acknowledgment, that he did not

mean to inſult the Court, have the effect of doing away his guilt, and all chance of puniſhment? Will this be a redreſs of the injury? No, ſir, the denial muſt be ſuch, that if it clears him of the contempt, it gives the party an opportunity of bringing an indictment for perjury. To my beſt belief, ſays he, this ſuit is at an end. He is ſwearing to a point of law. That point, if ever it had been thought neceſſary to make a queſtion on the ſubject, was to be decided by the court, and not by Paſſmore's belief.

The anſwers to the interrogatories were drawn up by Mr. Levy, as a profeſſional man, and we ſuppoſe that Mr. Levy did the beſt he could for his client. Mr. Levy knew very well that Thomas Paſſmore could not deny the facts charged, without being guilty of perjury. But if it was ſufficient for Mr. Paſſmore to ſay that in his belief there was no ſuit pending, could we ſuſtain an indictment for perjury? No, ſir. We ſhould be told that Mr. Paſſmore took advice from a ſtudent of law, who had informed him that he was right, and therefore the injury and the crime muſt go without redreſs or puniſhment.

In the ſame book, page 386, there is a ſhort dictum on the ſame point. It is the caſe of *Obrien* vs *Engliſh* and ſhews that "where a party anſwers interrogatories, as upon an attachment the oppoſite party may except to the anſwers at the bar, if they are ſhort or evaſive."

In *5th Brown's Reports of Caſes in Parliament*, page 84, we find the caſe of Bateman and Yielind *vs.* Conway and Bowman, where the brief of a party in a cauſe was clandeſtinely taken out of the chamber of his attorney, and made an improper uſe of by the oppoſite party. The Court ordered the brief to be returned and granted *an attachment*, not only againſt the perſon who had obtained it, but alſo againſt thoſe who had made uſe of it.]

I will not, ſir, trouble this honorable Court with reading all the caſes that I might produce, which bear upon this ſubject. I will refer my learned opponent to ſeveral reports—In 2d Blackſtone's Reports 1110, *(See Appendix, note* L.) in 1ſt Strange 384, where two perſons put in bail in feigned names, the attorney was conſidered in contempt and put in the pillory; in 2d Strange, 1184, where the Court granted an attachment againſt a Sheriff for allowing a replevin of goods diſtrained on a conviction for deer-ſtealing. In Hardwicke's Caſes, 42, where one of the Judges of the Kings bench had iſſued his warrant to a diſtant Conſtable, in another county, who refuſing to act, was puniſhed for the contempt. In 1ſt Burrows, 20, where an attorney's name to the proceſs was ſet thereto with-

out his authority, and the proceedings were ſet aſide,—and where one attorney's uſing the name of another attorney without his authority was conſidered as a contempt. In 1ſt Andrews, 196, *(See Appendix, page 63.)* there is a caſe of particular hardſhip, but it was conſidered neceſſary, for preſerving the regular courſe of juſtice, that it ſhould be puniſhed. In 2d Strange, 1089. Courts of local and peculiar juriſdiction have their own officers to execute proceſs, and whenever it becomes the duty of that officer to execute a local proceſs the Sheriff cannot directly act. Here a ſuitor obtained judgment in one of the Superior Courts of Weſtminſter Hall, the officer of local juriſdiction in King's bench is called upon to iſſue his mandate. He refuſes to iſſue it upon the ground of its being informal and ineffectual by not being within the juriſdiction of the Court, but the Court declared that whatever might be the caſe, they would never allow that the officer ſhould refuſe to receive their proceſs—and they made abſolute the rule for an attachment againſt the officer. In 1ſt Strange, 185, a man having treated the proceſs of the Court contemptuouſly, an attachment was iſſued againſt him on the firſt motion, *without a rule to ſhew cauſe.*

Sir, with theſe caſes in view, it certainly cannot be, that the puniſhment of Thomas Paſſmore for a contempt of Court is unprecedented; the poſition muſt certainly be wrong, although it may, perhaps, be the laſt hope of thoſe who urge it.

And permit me to ſay, ſir, that not only this ſummary mode is eſtabliſhed and ſtrongly fixed by precedent; but atonement and ſatisfaction to the injured party has been invariably attended to. Wherever there has been an intereſt of an individual linked with that of the public, it has always been a rule to obtain juſtice for the individual as well as for the public. It becomes a common caſe.

Sir, our own penal law countenances the principle and legalizes the practice. How common is it in caſes of aſſault and battery, after the diſpute has been brought into the eye of the law, that the parties compromiſe. So in caſes of goods ſtolen, when they are reſtored, it is common for the action to ceaſe. Does not my friend, the Attorney General, know that in many ſuch caſes he enters a *nolle proſequi* on the indictment? Sir, this is the cuſtom and the law of the land. So far as reſpects lights and ſhades of attrocity—whether the offence be great or ſmall—a fillip on the noſe, or a kick on the place of honor,—the principle is the ſame. Libels are on the ſame footing with felony, or with aſſault and battery. It is conſiſtent with the practice of the Courts, yes of the Courts of Pennſylvania for twenty years paſt.

The attorney general never thinks of bringing a profecution for a libel, unleſs the party injured makes complaint, and requires it. This practice is in all caſes countenanced, and it ſhews that the moſt particular object, is ſatisfaction to the party injured. If, however, it is connected with an injury to the public, or calculated to affect the purity of juſtice, the law will puniſh the delinquency at once, and apportion the degree of puniſhent to the offence.

Sir, if all the caſes that I have read, were out of view, is it not apparent that it is the duty of the Court to protect its own juriſdiction from outrage? The Court may commit a man for contempt without affidavit or teſtimony. A man may openly inſult the Court—the Court will commit him to priſon—the next day perhaps he is brought forward, and ſays that he was intoxicated—that he was never ſo before—that he is very ſorry, and prays for mercy. Well, ſir, will not the Court, if they fully believe his aſſertion, diſmiſs him? He has committed the contempt upon the Court, but he has made the atonement to the Court, which is the party injured. But if the injury is done to a ſuitor, and a libel is publiſhed, calculated to affect the deciſion of the Court or jury, the Judges will not take it up as if done to them perſonally. But the party is entitled to juſtice, and ſo is the public; and the Judges may ſay, that if atonement is made, we will conſider it in our ſentence—if you recant, and remove the obſtruction of juſtice, we will alleviate the puniſhment—but the merits of the queſtion ought to be tried free from the prejudice raiſed by that libel—the recantation muſt be full, and the prejudice compleatly done away.

The diſcretion of the Court is recognized in every caſe that has been produced. But the neceſſity of puniſhing offences of this kind, is equally acknowledged. Particularly do we find it in the deciſion of Lord Harwicke, when in the caſe of Pool, he ſaid that he knew him well, that he was an honeſt and an honorable man—that it was impoſſible he could have intended wrong,—yet as it might have an effect upon the due courſe of juſtice, and as ſuch proceedings ought to be diſcountenanced, he muſt puniſh even his friend, whom he had eulogized.

Sir, in the caſe of Paſſmore the conduct of the Judges was extremely mild and admonitory. If Thomas Paſſmore had come forward and made atonement; if he had ſaid that he acknowledged that he was wrong,—acknowledged that he had acted under erroneous impreſſions, that he had been miſinformed and was ſorry for his conduct, I preſume that Mr. Bayard would have come forward and ſaid he was ſatisfied. In this caſe I preſume the Court would not have ſaid you ſhall go free—you have compleatly cleared yourſelf. No, ſir, there is a

mode of procedure, which although it does not embrace ſtrict puniſhment, is often as effectual as the ſevereſt mulct. The Court might have called Paſſmore before them, and admoniſhed him in the face of the world; they might have ſaid "you have been guilty of a very groſs contempt; but you have very properly recanted, and the injured party is ſatisfied. The adminiſtration of juſtice is again clear, and the danger of prejudice is done away. So far as reſpects the fine and impriſonment, as this is the firſt offence of the kind that you have committed, we are willing to diſpenſe with the puniſhment. We hold the idea that you are a man who will never commit a ſimilar act. But if ever you ſhould, then this Court will conceive it their duty to direct that you be puniſhed in an exemplary manner."

This would go abroad to the world, and would have in a great meaſure the effect of puniſhment; and let me ſay, ſir, that this would be acting agreeably to a rule engrafted upon our penal code—that the example of the puniſhment, and not the ſeverity, is beſt calculated to prevent a repetition of the evil.

I will now crave your attention, while I go through authorities, and heap precedent upon precedent.

3d Burrows, page 1256 *(See Appendix, page* 20, *note* M.*)* The Court will pleaſe to recollect that in England all proſecutions iſſue in the name of the King, as in Pennſylvania they do in the name of the commonwealth. And here, ſir, let me draw your attention to the analogy between the outlines of this caſe and that of Thomas Paſſmore. It had been agreed that no bill in equity ſhould be brought, and the rule of *Niſi Prius* was made a rule of this Court. Now it does not appear that Paſſmore made any agreement not to publiſh the libel, but it does appear that Thomas Paſſmore knew the action was continued in September term, only two days before he publiſhed that paper;—he knew that the ſubject was under adviſement,—and he that has notice, or knows the will of the Court, and does not do it, is guilty of a contempt. No principle in law can be more clear.

Wheeler, having contrary to his agreement, brought a bill in equity, he was taken up upon an attachment, and examined upon interrogatories. He was reported in contempt, for he explicitly owned the fact charged, "though he pretended that he did not underſtand that he had ever conſented not to bring a bill in Chancery, nor ever meant ſuch conſent."

Sir, every part of this caſe ſerves to form a correct opinion of the caſe in diſpute. This was not an offence committed in

view of the Court. "After making the rule the defendant diſmiſſed his bill in Chancery" and paid all the coſts which the three perſons mentioned in the rule had been put to, together with his own.

Well, now, ſir, the contempt is not yet purged, altho' here is compleat atonement by the aggreſſor. "Nothing remained but for the Court to paſs judgment upon him for his contempt. The Court were unwilling to puniſh him further by fine and impriſonment; as he had ſmarted ſeverely; and yet as the contempt was obſtinate, they did not care that a ſlight ſentence ſhould ſtand upon their records. They therefore waved giving judgment by conſent. But that the attorney and counſel were equally guilty of the contempt, and more criminal, and that if it ever happened again, they would proceed againſt them."

Sir, my worthy friend muſt either deny this authority altogether, or ſay it is ſuch a caſe that no Judge could overlook without a violation of his oath and the law,—and I requeſt the learned counſel to weigh it well.

But, ſir, let me now remark, that when it is attempted to repudiate the Engliſh authorities, it is to do away that which does credit to the wiſdom of the country. It has been wiſely ſaid by Mr. Jefferſon, that the common law is to be collected from the uſual monuments of it. Theſe are recognized in our courts of Juſtice, in all caſes where they are applicable to our circumſtances, and where there is no prohibitory legiſlative act. Before the revolution, theſe authorities were conſidered as binding upon the Judges, and the evidences of the common law were derived from the deciſion of the Judges in Weſtminſter Hall; and in any deciſion before the revolution, the only enquiry was, whether it was ſupported by Engliſh authorities. Since the revolution, it is declared that excepting ſuch parts as are repugnant to the conſtitution, the common law ſhall be in full force. It is expreſsly recognized as the law of Pennſylvania. But from that, until the preſent time, no Engliſh authorities are regarded as binding, or obligatory; but they are read as furniſhing the reaſoning and information of wiſe and intelligent men. They are upon the ſame footing as thoſe of France, Spain, Germany, Holland, &c. If the ſame reaſoning which operated upon them, did not operate upon us, we would be unwiſe, we would be treacherous to our country to regard them; but we ſhould not deſpiſe them, becauſe they are decided by Lord Kenyon, or by Lord Heldon, but view them preciſely as any other book, provided they are not adopted upon an oppoſite rule of conduct.

Moſt of the authorities to which I refer, are antecedent to the revolution, and recognized by the conſtitution of the ſtate. They are obligatory upon our courts of juſtice,—and let me here add, they are obligatory upon this honorable Senate, ſitting as a court of judgment.

The ſum awarded againſt the defendant in the caſe I laſt read, was about 20*l.* Had he held up to the rule, he would only have had to pay that ſum. But, by deviating from his agreement, and bringing his bill in equity, he had to pay not only the twenty pounds, but about one hundred and eighty pounds ſterling. I wiſh, ſir there was not ſo much occaſion for conſidering this latter circumſtance in the caſe before us. It is a proof, how far a contentious ſpirit with bad counſel will go. I wiſh that Paſſmore, inſtead of taking his cruel and vindictive meaſures, had taken the ſalutary advice that had been given to him; and I wiſh it had been conſidered what would have been the enormous expence to the ſtate, attendant on the examination of this ſubject, on ſuch a ſlight and trifling foundation.

1*st Thomas Jones*—178—(*See appendix, page* 30.) This is ſelected, not upon the ſimilarity in the nature of the offence, but upon the principle of puniſhing contempts generally. So *in Lord Hardwicke's cases*—150—(See appendix, note W W. page 63) where an attachment for not obeying an order of the ſeſſions, was confirmed in the Court of Kings' bench. Again, ſir, in *Andrews*, 275—where an attorney had ſerved a proceſs upon a perſon while he was attending a ſuit in Court. An attachment was granted againſt the attorney; and though in this caſe the puniſhment was waved, yet the Court held that the ſerving of any proceſs in the view of the Court was a contempt, and puniſhable by attachment. But let me aſk, to whom was it conſidered that the expiation was to be made? It was to the party. The proceedings of the Court were not impeded—nor did it appear to affect the cauſe then pending. But an injury might be done to the party, and upon that principle alone was the attorney attached. In *Vernon and Scriven's reports*, 299, 300, another ſuppott is given to the doctrine, for which I contend; and in another volume of reports of caſes in Ireland, which goes under the name of Iriſh term reports—page 248. George Haſlop had been attached at the inſtance of the plaintiff, and came up to be diſcharged upon interrogatories. He had executed a bond for the appearance of himſelf and one Reeves. Two affidavits were made of his having as ſubſheriff been guilty of extortion. Upon theſe affidavits an *additional* rule for an attachment was granted, and, Haſlop not having ſhewn cauſe, that rule was made abſolute.

M. Haſlop applied to be diſcharged from the attachment. His counſel ſtated that in May 1787, he went to London, and

during his reſidence there he never heard of the proceedings againſt him, nor did he know any thing of them till his arreſt. He returned from England in 1789, and reſided at *Clonmel*, (in the vicinity of the Court) yet no attempt was made to arreſt him, nor any proceedings had under the attachment until December 1792, when he was arreſted for a ſum comprehending the plaintiff's demand, and the coſt and fees paid to the ſheriff. It alſo appeared by the anſwers to the interrogatorits which were exhibited to him, that he neither was clerk to the ſub-ſheriff in 1787, nor did he act as ſub-ſheriff in that year, further than February 1787—and that to the beſt of his knowledge and belief, he did not receive the money as ſo charged, &c.

Now, ſir, here will I teſt the anſwers of Thomas Paſſmore. And I will clearly prove, that with reſpect to any fact charged in the interrogatories, he muſt ſwear poſitively. Whenever a party comes before the Court to anſwer interrogatories, he muſt anſwer yea or nay, and this is neceſſary, to aſcertain whether atonement has been made ſo as to juſtify amelioration of the ſentence. He muſt either acknowledge the fact, or deny it in ſuch a way, that if he ſwears falſely, the party can have remedy by an indictment for perjury.

Lord Clonmell, in the courſe of his opinion, among many other remarks on this caſe, obſerves, that "here is a new mode of anſwering introduced, which I muſt condemn. "I did not do ſo to the beſt of my knowledge or belief." Here Haſlop got the money and reward. As to his ſaying "to the beſt of his knowledge," ſee whether he does or does not take advantage of his own wrong. He apprehends that the day of reckoning may come. He runs to England. In 1792 he executes a bond for his appearance and that of *Reeves*, and he does not appear until this hour; whoſe fault is it that he does not come before the Court? It is this man's. He is in contempt." "We cannot poſſibly diſcharge him. Let him ſettle the amount as to the coſts, and the plaintiff's demand, with intereſt; and then let him come before the Court for his puniſhment for the contempt."

I will now, ſir, with the permiſſion of the Senate, refer to a caſe which is not certainly obligatory on this honorable Court, but it will ſerve to ſhew that the ſame ſyſtem has been purſued, down to the preſent time. It is the caſe of the King againſt Seaton, lately decided in Weſtminſter Hall, and my worthy friend, the manager, who is not much attached to Engliſh authorities, will readily excuſe my reading it from an Iriſh newſpaper, which is perhaps a more reſpected authority, than an Engliſh book. *Hibernian Journal, May* 20, 1804. (*See*

appendix—page 64.) Now, ſir, what is the language of Lord Ellenborough—that the defendants "behavior to the proſecutor, bore the character of illiberal vulgarity." "He was not to look to a ſpeedy enlargement of his perſon from confinement. It would be well for him, if by his contrition he could make his peace with Mr. Wickham."

Sir, I could heap authority upon authority, and pile book upon book, until the honorable Senate would find it inconvenient to ſit, to ſhew that this has been the univerſal practice in the caſe of contempts.

And will it ſtill be ſaid, that the anſwers of Thomas Paſſmore, were ſufficient to purge the contempt? His not being a lawyer, ſir, is no juſtification. For in *12th modern*—348, we find it clearly and deciſively laid down, that ignorance of the law may be offered in mitigation—but never can juſtify. Again, ſir, in *8th modern*—123. *(See appendix, note O, page 22.)* The next, ſir, is in *Moſely*—251. I will only read the cloſe of the caſe. (See appendix, page 22, note N.) It is to be obſerved, ſir, that if any perſon ſhall marry, or be acceſſary to the marriage of a minor, under the care of the Court, he is guilty of a contempt. And in this caſe, as in all ſimilar caſes, it has been decided, that even though they were ſtrangers to the decretal order, that circumſtance could not clear them of the contempt. Ignorance of the law, or the fact, is no excuſe. It may go in mitigation of the puniſhment, but cannot purge the contempt. In 3d Pere Williams—116, we find a ſimilar caſe.

Sir, ſtill further upon the power of the anſwers to purge the contempt, we find in *12th modern*—511, a deciſion that goes particularly to ſhew what ought to be the nature of the anſwer to purge the contempt. It is the opinion of the Court in the caſe of the *King* vs. *Simons*, and is thus: "*Per Curiam.* If one brought in, in contempt, deny all upon oath, he is of courſe diſcharged of the contempt; but if he has forſworn himſelf, he may be proſecuted for perjury."

I am drawing near to the cloſe of authorities on this ſubject. I will again, however, refer to *Lord Harwicke, page* 237. It is a part of the caſe which I read before, and therefore I ſhall not again trouble the honorable Court with reading it. The principle fact charged in that caſe was that of the parties bringing a fictitious action in deceit of the Court, and as it appeared that it was a fictitious action it was declared to be a contempt. But, ſir, the truth or the falſhood, was declared to be not of material conſequence, as the effect upon the Court would be the ſame. In the caſe of Paſſmore, the

only queſtion to which it was neceſſary for him to give an anſwer, was, "*did he publiſh the libel?* If he ſaid "*Yes*," then it was a contempt. If he ſaid "*No*," it remained with us to bring our indictment for perjury. But an attempt to get rid of, or evade the queſtion by his ſtating that he believed there was no ſuit depending; and an attempt to juſtify the libel, without ſhewing any remorſe or compunction for what he had done, was an aggravation of the contempt. 2*d Douglas*, 516, *(See Appendix, note* Y Y. *page* 65.*)* Here the practice of the Court is declared to be, that if the defendant by affidavit, fully denies the charge, the contempt is purged; but if he ſwears falſely, he is to be puniſhed by indictment. 6*th Modern*, 73. *(See Appendix, page* 21, *note* W.*)* I will not read again the caſe of Shebbeare, where the defendant did every thing to purge the contempt, and ſaid he thought that he had done every thing according to law. But in every caſe wherever purgation is ſpoken of, there is a reference to puniſhment by an indictment for perjury. Nothing but a flat denial will purge the contempt. 8*th Modern*, 81, *(See Appendix, page* 23, *note* P.*)* Now here we have the whole in a very compendious manner; his own negative oath ſhall be more forceable than all their affirmatives. In other caſes, ſir, an affirmative may be viewed with greater regard than ninety-nine negatives, becauſe it may be true that the ninety-nine negatives may not be able to ſee the object ſworn to, and yet the one affirmative may ſee it. But in caſes of contempt the one negative purges the contempt. In this caſe, however, it appeared that the purgation was not compleat. Why? Becauſe the defendant did not, by his anſwer, plainly deny the facts charged.

8*th Modern*—110. *(See appendix, page* 32.*)* Here the defendant, in anſwer to interrogatories, ſwore off all that was charged againſt him, for which he was afterwards indicted and convicted of perjury. In *Irish term reports*—235, and in 244, (Haſlop's caſe) the doctrine is again ſupported.

In 4*th Burrows*—2129. *(See appendix, page* 23, *note* Q.*)* Here the defendant was denied the opportunity of anſwering upon interrogatories; becauſe his anſwers might go to traverſe the return, which is matter of record, and no man can ſwear, to diſprove a record.

Now, ſir, I am going to read the laſt of this ſeries of authorities. It is merely to prove that where a man ſwears to that which it is impoſſible to believe, he is not entitled to credit. Upon the ſame principle, where a man has knowledge of a record, or where a man is in Court, and hears all that paſſes, and afterwards ſays that he knows nothing about it, that man is not entitled to credit.

[Here Mr. Dallas read a caſe in 6th term reports—701, where an attorney being required to anſwer the matters of an affidavit, ſwore, in his exculpation, to an highly incredible ſtory. The Court granted an *attachment* againſt him, though he poſitively denied the mal-practices imputed to him.]

If, ſir, the ſtory is not credible, an attachment muſt be granted. This was the opinion of the learned Mr. Erſkine; than whom no man could be better informed on legal queſtions—no man whoſe "eloquence and *ſophiſtry*" were better exerted in ſupporting a cauſe.

Have I then ſatisfactorily ſhewn to this honorable Court, that the power of puniſhing contempts, is a ſummary power; and that this power is an inſtrument of common law?

Have I ſhewn that the publication of any thing that can affect the juſtice or the merits of a cauſe, while that cauſe is pending, is a contempt?

Have I ſhewn, that the publication by Paſſmore, repudiating the party to which he is oppoſed in a ſuit, and denouncing him as a perjured villain, a liar, and a ſcoundrel, is a flagrant contempt, and puniſhable by attachment?

Have I ſhewn, that his anſwers to the interrogatories were not ſufficient to excuſe him, and that he could not eſcape by ſaying that he meant no offence to the Judges?

Have I ſatisfactorily ſhewn to this honorable Court, that a purgation muſt be by a poſitive denial upon oath, of the fact charged?—that there is a diſcretionary power in the Judges to mitigate, or ameliorate the puniſhment, provided atonement is made?—and that in all caſes where the intereſt of an individual is leagued with the intereſt of the public, reparation or atonement to the injured perſon, is a primary, or at leaſt an inſeparable conſideration?

Have I proved all theſe things, ſir? And, if I have, let me appeal to the candor of the learned counſel to ſay, that the puniſhment of contempts by ſummary proceſs, is a puniſhment coeval with the common law itſelf—that it is neceſſary to the adminiſtration of juſtice,—and that without it, the ſacred trial by jury would become a mere mockery and a farce.

It now appears, that the common law is a part of the law of Pennſylvania, has been ſo acknowledged by repeated acts of the Legiſlature, and by repeated judicial deciſions. When the illuſtrious William Penn, proſecuted his views of ſettling in a

wilderneſs, it is not to be preſumed that he expected to find a ſyſtem of laws among the ſavages, adapted to the circumſtances of civil ſociety, and the proper organization of his people. That good man did not ſuppoſe, that immediately upon his arrival in this country, a regular government ſhould be inſtituted, and laws ſtart up like the trees of the wilderneſs. He knew that mankind were liable to error, and that he was accompanied by men of the ſame infirmities that are incident to the human race; but as they were actuated by the ſame motives with himſelf, and equally anxious for the preſervation of their rights, it became incumbent on him to take care that thoſe rights ſhould be preſerved; and that there ſhould be a proviſion by law for a due adminiſtration of juſtice, and for the general purpoſes of ſociety. In the charter of Charles the Second, I do not recollect that the common law is mentioned; but he was authorized to eſtabliſh ordinances and laws for the benefit and ſafe government of the people, in all caſes where they where not repugnant, or contrary to the laws of Great Britain, & we find that he eſtabliſhed a legiſlature, for the benefit of his followers. Sir, the expreſſion is legally that he ſhall have, for himſelf and followers, the benefit of the laws of England. Judge Blackſtone very juſtly conſiders the law of England, as the *genus* and the common law as the *species* of that law. They entered into conceſſions and conditions, in which the law of England, ſo far as it would be applicable to their ſituation was expreſsly recognized. They were bound by a ſolemn inſtrument called "Laws agreed upon in England,"—. in which there was a recognition of the common law of England. Under theſe circumſtances, William Penn and his company came to this country. Their agreement may more properly be called the law of the contracting parties, than the law of the land. But it is well known, and the learned counſel will concede it to be fixed principle, that when a mother country ſends her people, to ſettle a country, they carry with them ſo much of the ſtatute and common law of the mother country, as is compatible with their new condition.

The object of the common law is to inſure happineſs, comfort, ſecurity and to thoſe who ſeek ſafety in ſociety. The law is to be applicable to the condition of that ſociety. It will be neceſſary to explain to this honorable Senate, what is meant by the application of the common law. The obvious meaning is this, that ſuch laws as are ſuited to the condition and wants of the perſons, and whatever has been acted upon, or made a uſage of, in the judicial deciſions, this is an application of ſo much of the common law, as may be ſuited to their ſituation. In every ſtatute paſſed by the Legiſlature, that much of the common law has been recognized, as being adopted. Again, ſir, as ſoon as the Courts of Juſtice were inſtituted by Mr. Penn,

whatever was approved through the medium of a Judge of the Court, was applicable as a law of the land. This is not only a correct doctrine, ſo far as reſpects William Penn and the ſettlers, but it extends to every ſettlement on the continent; as is proved by the contemporary writers. Tucker's Blackſtone, a work that does honor to America, and adds dignity to ſcience, not only goes to a recognition of the common law, ſo far as it is applicable to this country, but he ſays expreſsly in his [1ſt vol. note E. pages 381, 2, 3, 4. (See appendix, note T. page 27.] As I ſhall have occaſion to refer to that celebrated doctrine, as it is laid down in page 380 of this volume, where he ſays, that incidents had given riſe to the opinion that the common law is not only applicable to the ſeveral ſtates, but the federal government is regulated by it—[reads.] (See appendix, note S. page 26.) I ſhall only read thoſe things ſo far as reſpects the preſent ſcope of my argument. Then ſo far as reſpects the opinion of Judge Blackſtone, Mr. Tucker refutes his argument, that this country is to be conſidered as a conquered country; and he, in a very able manner, takes a view of the applicability of the Engliſh laws to the colonies. I ſhall read a few paſſages on this ſubject.—*(See appendix, page 75, I. 3.)*

I turn to the note affixed by Chief Juſtice Kinſey, to his edition of the laws of Pennſylvania—[1ſt ſtate laws. (See appendix, note L. L. page 44.] He publiſhed his edition for the convenience of thoſe who were intereſted in landed property, and for a hiſtory of the laws of the country; he gave an account of all obſolete laws, and at the ſame time remarked on the nature of thoſe laws. (Here Mr. Dallas read the extract.) Now, at that early time of day, it was declared that the common law of England was in force in Pennſylvania, unleſs where it was altered by the acts of aſſembly.

In the caſe of the U. States *vs.* Worrell, in the Circuit Court of the Pennſylvania diſtrict, it was agreed that little ſhould be ſaid on either ſide, but after ſome obſervations on the part of the oppoſing counſel, we thought it our duty to enter more largely into the merits of the caſe. The preſiding Judge of the Circuit Court of the Pennſylvania diſtrict, Mr. Chaſe, was ſo ſatisfied with the nature of the argument, that, after I had concluded, he ſtopped Mr. Levy, and ſaid he had no neceſſity for going further, as he was perfectly convinced. In that caſe, he happened to differ with Judge Peters—[2d Dal. rep. 384.] (See appendix, note H 3, page 72.)—reference to the judicial acts is this: the act of Congreſs has a ſection declaring that, wherever the laws of the ſeveral ſtates apply, they ſhall be the rule of deciſion in the general Courts. Mr. Peters differed from Mr. Chaſe in opinion ſo far as reſpected the common law being veſted in the U. S. Courts, but not as to the recognition of the common law by the ſeveral States. It may be a

defect in the law eſtabliſhing the Courts, that common law juriſdiction, in criminal caſes, has not been given to the Courts of the United States. Mr. Chaſe was clearly of opinion that the Courts of the United States were veſted with the powers of the common law. It would be a happy conſideration, if this Judge had acted ſo prudently in all his judicial proceedings. No lawyer would have reaſon to complain. But, whatever may be the fate of the preſent enquiry into his judicial conduct, he has always been remarkable for the quickneſs of his perception, and the ſoundneſs of his judgment.

Further to prove that the common law is a birthright and inheritance, and adopted as the beſt means of preſerving our rights from violation, permit me to turn to the 1ſt vol. of this edition, page 67.

Adjourned.

SAME DAY, *P. M.*

Mr. DALLAS, in continuation.

In the year 1782, Mr. Speaker, and gentlemen of the Senate, this ſubject was conſidered, and a deciſion had in ſupport of the principle now contended for. In page 67, reports of deciſions in the Supreme Court of Pennſylvania, I find Chief Juſtice M'Kean ſtating the doctrine in this way—"This ſtate has had her government above a hundred years, and the ſtatute of *embracery* has never been extended either by law or practice, during that period. It is the opinion of the Court, however, that the common law of England has always been in force in Pennſylvania; that all ſtatutes made in Great Britain *before* the ſettlement of Pennſylvania, have no force here, unleſs they are convenient and adapted to the circumſtances of the country; and that all ſtatutes made *ſince* the ſettlement of Pennſylvania, have no force here unleſs the colonies are particularly named." Then at that time of day it was determined without any reference to the caſe of Oſwald, or of Paſſmore, that the common law of England has always been in force in Pennſylvania—that it is a birth-right and inheritance.

So early, ſir, as the year 1718, the aſſembly of Pennſylvania ſupported this opinion. In an act paſſed that year, entitled an act for the advancement of juſtice, it is declared as a ſettled point, that the common law is the birth-right of Engliſh ſubjects, and ought to be their rule in Britiſh dominions, &c. *(See appendix, page 37—note A. A.)* And in the next ſection, it is enacted, "that all inqueſts and trials of high treaſon ſhall be according to the due order and courſe of the common law,—obſerving the directions of the ſtatute laws of Great Britain, relating to the trials, proceedings and judgments in ſuch caſes."

This, ſir, is before the revolution, that the people of Pennſylvania declared the common law of England to be their birth-right and inheritance. I now turn to the recognition of that declaration ſince the revolution. This is the act of 1777. Sir, it was the ſecond act paſſed by the Legiſlature of Pennſylvania, under the conſtitution of 1776. Indeed I may ſay it is the very firſt act of government, and it paſſed in January 1777. *(See appendix, page 38—note C. C.)* So far, ſir, with reſpect to the acts with which the Legiſlature of the colony formed its own laws.

Now, of what nature were the exceptions to this general adoption of the common law—the ſtatutes of England, and the Legiſlative acts of the colony which had been in force? [Here Mr. Dallas read the exceptions,—being generally to ſtatutes of treaſon, or relating to the ſtile of proceſs, to laws that order the taking of an oath of fidelity to the King of Great Britain, or his ſucceſſors; or that acknowledge any authority in the heirs or deviſees of W. Penn; or that preſcribe the number of the members of aſſembly, or the qualifications of electors; or that command or direct any thing repugnant to, or inconſiſtent with the conſtitution.]

In this act there are no exceptions to the principles of the common law. It is merely a declaratory act, adapting the laws heretofore in practice to the new ſituation of the people.

Sir, *before* the revolution in the moſt ſolemn manner, this common law is claimed as a birth-right; and, *ſince* the revolution, it is poſitively adopted as the law of Pennſylvania. I pray the honorable gentlemen, who oppoſe us, to look at the whole of the act, and they will perceive that the exceptions only extend to one ſingle point, and that is the prerogative claim.

In the ſame book, the late Chief Juſtice's edition of the laws, page 272, we find a law paſſed in 1780, erecting the high Court of Errors and Appeals—[Here Mr. Dallas read of this law, ſections 5, 10, and 11, for which *see appendix, page* 41—*note* G. G.]

Thus we go on ſtep by ſtep with the recognition of the common law of Pennſylvania. From the firſt day of the ſettlement of the country, to the preſent time, this law is claimed and acknowledged as the birth-right of the people. Let us juſt look at the firſt epochs of the colonial government by a Legiſlature. In the firſt volume of the laws, [Dallas's] page 50, we find that the act againſt rioters, declares "they ſhall be puniſhed *according to the laws of England*;" and in the ſame

volume, page 59, it is declared that writs of replevin shall be grantable by the justices, in all cases whatsoever where grantable *by the laws of England*, taking security *as the said law directs*, &c. Sir, there has not been a single act, or provision to do away these laws.

In the same book, page 129, and also in page 98, (101) section 7th, the principle is again recognized. The Orphan's Court is authorised to proceed *according to the rules of common law*. And from the time that this act was passed, to the present day, there has not been a single act to repeal, or annul that authority. It is the law of Pennsylvania at this moment. All matters of guardianship, are dependant upon this authority. In the same volume, page 176, section 3, it is declared that "the justices of the peace shall hold their sessions *according to law*, and as fully and effectually as any justice of the peace, justices of the assize, justices of oyer and terminer, or of general jail delivery, may or can do;" and in section 4, they are authorized to take recognisances in the same manner as the justices of the peace in Great Britain, may can, or usually do—and to issue process "*according to law.*"

Now, sir, we have no authority, no definition of the powers of the justices of peace, except it be by a reference to the practice in Great Britain. They are to be governed by the English course of law. But we even find it enacted in the late Chief Justices' edition of the laws, page 314, section 20—(*See appendix, page 47, part of note* O. O.) that maritime offences are to be tried *according to the course of common law*. This, sir, is so late as the year 1780.

Now, sir, I am travelling hastily and cursorily over the ground, after the adoption of 1776, and between that and the constitution of 1790. There is another authority in the 2d volume of the state laws—(*See appendix, page 47—note* P. P.) an act passed in 1782, the 3d section of which declares, that in determinations of the board of property, nothing shall be construed to prevent either of the parties from bringing their action *at common law.*

Many other instances of the express recognition of the common law, might be adduced; but I trust I have read enough, to remove all doubts that might exist on the subject.

Let us now refer to the estimation in which this common law is held by other states; and I pray the attention of the honorable Court, in order to listen to the sentiments they have expressed in their constitutions. In the constitution of New York, article 35—in the constitution of New Jersey, section 22—in

the conſtitution of Delaware, article 8, ſection 10—in the conſtitution of Maryland, ſection 3—[Mr. Dallas read all theſe authorities, for which (*See appendix, pages 69 and 70—note E. 3.*)] Now, ſir, what is the language expreſſed by all theſe ſtates. In every caſe, there is acknowledgment and adoption of the common law. And now, ſir, will the gentleman be able to ſhew us any thing in any one of thoſe conſtitutions, reſtricting the right of trial by jury?

I will not detain the Senate with many more inſtances which I could produce, but will merely refer to the conſtitution of Teneſſee, which was made at a time when they had the full benefit of experience, and an opportunity of reviewing other conſtitutions. This conſtitution is bottomed as it were upon that of Pennſylvania, and indeed it is very much to the honor of the people, who in 1790 framed the conſtitution of Pennſylvania, that all the conſtitutions ſince that time have adopted its principal features and proviſions.

I now beg leave to refer to the celebrated report of Mr. Madiſon. Some years ago, the ſtate of Virginia took alarm at the high-handed meaſures of the adminiſtration of the general government. They ſaw the alien act, they ſaw the ſedition act, and other obnoxious laws obtruded upon the people. They ſaw that certain influential characters were deſirous, through the medium of a legiſlative form, to ſubvert the conſtitution, and to palm upon the people ſomething like a monarchy. At that time of day, the republicans did not poſſeſs the power that they now do, and which I hope they may long poſſeſs. The Legiſlature of Virginia, in this ſtate of things, repreſented it to the other ſtates. They met with anſwers, ſome of which were at leaſt indecorous. From every ſtate, repulſive anſwers were received, and we well know it was the caſe from Pennſylvania. Now, it was the duty of Virginia to vindicate the character of her Legiſlature. I believe that the virtuous and honorable gentleman, who is now ſecretary of ſtate, and the number of wiſe and good men who were collected with him, had no other object in view but this, and to expoſe the fallacy of the objections of the ſiſter ſtates. They acted from pure motives. And the report does them as much honor as it does him—*pages* 24, 25, 27, 28 and 32. I am proud, ſir, of ſaying that this copy was tranſmitted to me by the Preſident of the United States, as a thing upon which he relied. The whole of this celebrated ſtate paper, ſir, is worthy of the peruſal of every man who is intereſted in the welfare of his country.

The evidence of the adoption of the common law is to be offered through the medium of the Legiſlatures and the Courts of juſtice. I refer again to Tuſker's Blackſtone, 394—411

(See Appendix—page 45.) I will not read the paſſages. But will refer to what occurred in our own ſtate. 1ſt Dallas's Reports, 74. *(See Appendix—page 46.)* The queſtion aroſe in the trial of four Italians for the murder of Captain Pickles. The Court aſſigned counſel for the priſoners, who moved for an award of a *tales de mediatate linguæ*. By a Britiſh ſtatute every alien is to be tried by a jury, one-half of which to be natives, and one-half foreigners. It became a queſtion whether by the laws of Pennſylvania that ſtatute could be adopted. This was in the year 1783, ſeven years after the conſtitution of 1776 had been framed. It appears that in a previous deciſion it had been allowed; and Chief Juſtice M'Kean, upon the ground of *precedent*, granted a trial *per medietate linguæ*. Here, ſir, as in the caſe of Paſſmore, was no political difference, no oppreſſion, no arbitrary conduct, no diſpoſition to amplify juriſdiction. This was a caſe of homicide, a caſe of perſons charged with murder; but they were entitled to the full benefit of the law—the precedent was eſtabliſhed and muſt be followed, if not pointedly abſurd. The deciſion was by one who has juſtly received the confidence of the people; and I will ſay, as to his capacity as a common-law-judge and as a man of ſtrict integrity, no man ever ſurpaſſed him. So preſſing was the obligation he was under of adhering to precedent, the Judge declared, that if it was a new caſe, the judgment of the Court would have been different; but as it had been ſo decided before, he conſidered it as obligatory upon the country. It was an obligation of oath and duty.

Now, ſir, when this was ſeen by the country 21 years ago, and when I ſhall ſhew you that in the year 1788, the whole principle of Paſſmore's caſe has been ſtrictly recognized, where are we to look for the crime, the arbitrary and oppreſſive conduct which has been charged upon thoſe gentlemen? Is there any error in law? No—there cannot be; for both law and cuſtom were ſtrictly followed. If there is any error in judgment, let not the gentleman, as he values his legal reputation, charge it upon us as a crime.

Sir, I have ſhewn that my ideas are not correct, not only as to the common law, but as to its adoption and recognition in this ſtate; and that this was neceſſary for the ſafety of our lives, our property, and our reputation. If, however, the argument which I have uſed, does not produce a conviction, that the common law has been adopted, then let me lead you to the laws of Pennſylvania, and ſhew that the Legiſlature have recognized not only the common law, but explicitly the authority to puniſh contempts. I will now confine myſelf to Legiſlative record, for an acknowledgment of the doctrine I contend for. I will trace it from the firſt ſettlement of the country, unto the preſent day, through Legiſlative acts and ſolemn judicial deciſions. I will proceed in the order of time.

In the charter granted by Charles the ſecond to William Penn, in the conditions to thoſe who purchaſed under him; in the laws eſtabliſhed on the firſt ſettlement of the country and in the ſucceſſive frames of government,—I believe three of which took place under the time of the colonial adminiſtration, —not one ſyllable is to be found on the ſubject of attachment for contempts. I agree that there is not one word—not a ſingle ſyllable. What I infer from this, however, ſir, is only as it reſpects the written documents, but if I find it ſpoken of, over and over again, in the Legiſlative proceedings, I truſt that I ſhall not fail, in ſufficient authority on this head. I beg the gentlemen to remember my preliminary remark—there is not a ſingle document extant on the ſubject of contempts previous to the year 1713, and yet, ſir, I will ſhew you act after act ſpeaking of this proceſs of attachment. Where, then, am I to find this power? How is it to be underſtood? The common law gives you the *genus*, and there will you find the authority.

There is, ſir, not a ſingle written document, that will authorize the language of the Legiſlature upon this ſubject, and yet we find in the act of 1718, ſection 8, page 101, vol. 1 of the ſtate laws—*(See Appendix to this book, page 43.)*

That the Court may "ſend *their* attachment for contempts." It muſt be ſomething that belongs to them; it muſt be ſomething that is inſeparable from their organization. Is it by the charter of William Penn? No. By ſome acts of one of the three governments? No. By ſome antecedent eſtabliſhment? No. But it is recognized by an act of aſſembly. I am aware, ſir, of what my worthy friend may ſay—that it is not a common law, but a civil-law juriſdiction. Be it ſo. Agreed. This is part of my ſyſtem of reaſoning. How comes it here? How comes the civil law to be recognized in Pennſylvania. In the act itſelf, there is no recognition of the civil law. But as a lawyer, and a man of honor, I tell you that it is adopted here as it is in England, as a part of the common law. Without this power, how can they execute an order of the Orphan's Court? Is not the power of attachment abſolutely neceſſary? The honorable the worthy and intelligent member will acknowledge that ſuch a power is indiſpenſable. I am ſure he underſtands it correctly, and I know he has candor enough to acknowledge it. If any man diſobeys an order of the Court, he is liable to an attachment for contempt. "This is taking a great latitude. Civil liberty is a great object. No man can be touched. Trial by jury muſt never be diſpenſed with;" and yet the puniſhment by attachment is eſtabliſhed. It is neceſſary and proper.

The auditors accounts, and executors accounts are ſettled in the Orphan's Courts. The practice exiſts to this day. Yet there

is no trial by jury. Nothing of that kind. Nothing can be done, although a man's property may be sequestered. Now this is all done under the constitution—and without a trial by jury. I won't dwell on it. It is too plain to be misunderstood. I hope the Senate clearly understand me, and I defy the honorable counsel to produce a single instance in which the Orphan's Court have this power granted to them by any specific written document. It is a thing taken for granted, a necessary appendage, and as such recognized by the Legislature.

In the same book, page 261—a law of 1730—*(See Appendix to this work page 43.)* Here, sir, they speak of contempt, and that the person of an insolvent debtor shall not be again imprisoned on account of any contempt committed before his discharge. What is the meaning of this provision. There must be some law to give the Legislature an idea of contempts. Where is that law? Is it written? Where am I to find the written authority for it? Will the honorable counsel shew me any thing of this kind? No, sir, he cannot. After having myself published an edition of the laws of Pennsylvania, I have in vain searched for any such record or authority. It is contempt *generally*, not any particular species. Where am I to find any authority for this?—Must I refer to the common law? Be it so, and I will go further and say that it is no where else to be found.

The word calls for an explanation, or it would not be there. How am I to find the meaning of it? By referring to their own acts. I find no explanation there; because it was generally understood to be derived from the maxims and customs of the common law, and judicial decisions under it.

In the same book, (page 267—*See Appendix to this work, page 44.*) Now, sir, here is a provision for the punishment by attachment, not only for contempts committed in the face of the Court, but for those committed out of the view of the Court; and even here the Judges, or Justices are to take into view, reparation to the parties injured, as they shall think just.

After the constitution of 1776, and between the constitution of 1790, the same power is again recognized and established in the Courts. In the Chief Justices' edition of the laws, page 291, section 9—*(See Appendix, page 42.)* Now, sir, this is at a time when the constitution, which the worthy manager has so much extolled, and so justly extolled, is in full operation. "No man can be deprived of his liberty, except by the laws of the land, or the judgment of his peers. In trials between man and man, the parties have a right to trial by jury, which ought to be held sacred. Trial by jury shall be as heretofore." In

the year '80, what do the Legiſlature do? And the gentleman will find when I come to touch upon the report of the council of cenſors, that it does not bear the alluſion which he has given to it. [Here Mr. Dallas read the 9th ſection above mentioned.]

This, ſir, was in the year 1780, and what did the Legiſlature do then? They authorized an auditor of accounts, to call before him, not only the accountable perſon, but every perſon whom he thought could give information on the ſubject. Upon mere ſuſpecion of a knowledge of any thing concerning the buſineſs before him, he could call you from your houſe on the banks of Suſquehanna, and me from my houſe in Philadelphia. He poſſeſſed this power by law, ſir, under the conſtitution; and I don't think that the council of cenſors ever complained of it. And where do they get the idea of contempts? Where do they borrow it from? The conſtitution under which the Legiſlature acted, provided that "trial by jury ſhould be as heretofore." Yet theſe auditors had the power by law to puniſh contempts by attachments, without a jury. The Legiſlature gave it to them. How could they do it? Let us ſay it was an error in judgment, of the Legiſlature. Will the gentlemen accept of that compromiſe? But, ſir, when I find that inſtrument receive the ſanction of the ſages of the country—when I find attached to it the venerable name of Franklin—when I ſee all this; and when I ſee a Legiſlature, with that conſtitution full in view, paſs a law of this kind, I cannot believe that it proceeded from an error in judgment, but from a due regard to the adminiſtration of juſtice. Let us look at the 10th ſection; we cannot believe it was ever aimed at the deſtruction of the trial by jury or the ſubverſion of the conſtitution; and if it was, ſuch is the independance of our profeſſion that I believe there would not have been found a ſingle man among them to juſtify it. "Section 10. *Provided always*, &c. That if upon any ſubpœna or ſummons, requiring the attendance of any perſon or perſons before the ſaid auditors as aforeſaid, a return be made, that ſuch perſon is not to be found within the proper county, then the ſaid auditors, or any two of them, may iſſue an attachment, and proceed thereon as aforeſaid, as if ſuch ſubpœna or ſummons had been duly ſerved."

Sir, the auditor has iſſued his proceſs under ſuſpicion that the perſon is poſſeſſed of certain information, but provided the perſon is not within the county, then the auditors or any two of them may proceed by attachment and ſummary proceſs.

Good God, ſir, are we exclaiming againſt the Judges, whilſt we ſee this before us? If the perſon has been ſerved with a ſummons and does not attend he muſt be immediately impriſon-

ed. If he is out of the county, although he has not been ſummoned, the auditors may iſſue their attachment and proceed thereon. Well, ſir, what would be the conſequence if you or I were dragged out from our homes, perhaps to the remoteſt part of the ſtate—no matter, what might be the ſituation of ourſelves or our families. But ſuch, ſir, was the power given by the Legiſlature of 1780, under the conſtitution of 1776.

In all countries where there is any important commercial regulations neceſſary, there is an admiralty juriſdiction.—— They take cognizance, agreeably to common law, not only of civil, but of criminal matters. This was particularly the caſe according to the maritime law of England. When the American revolution took place, it became neceſſary for this country to have ſome maritime regulations, particularly defined. An admiralty juriſdiction was eſtabliſhed accordingly, and I am now going to refer to an act in which this proceſs by attachment is allowed—an act in which the admiralty had the power of puniſhing contempts by ſummary proceſs.

I will not, however I might uſe much of this act as applying immediately to the ſubject, yet upon a caſe of this kind and before this kind of a tribunal, I will not make uſe of any authority but ſo far as it directly applies. When I turn to the act, & diſcover that they have the power of puniſhing contempts, I think it is a ſomething granted that ſuch power is recognized under ſome general ſyſtem. It is an authority ſuppoſed to exiſt in ſome previous law, or in ſome ſtatute; but I cannot find it, unleſs I go to the common law. The maritime laws are merely component parts of the common law. Now, ſir, I turn to what is ſaid upon this ſubject, in the ſame book, page 308.

SECT. 1. Whereas it is neceſſary that due proviſion be made for the trial and determination of offences, crimes, controverſies and ſuits within the cognizance of the maritime law, and not enquirable at common law.

SECT. 2. *Be it therefore enacted, &c.* That a perſon of known integrity and ability ſhall be appointed and commiſſioned by the ſupreme executive council of this commonwealth, for and during the term of ſeven years, in caſe he ſhall ſo long behave well, by the name and ſtile of Judge of the Admiralty; which Judge ſhall hold a Court of Admiralty, and therein have cognizance of all controverſies, ſuits and pleas of maritime juriſdiction, not cognizable at the common law; offences and crimes, *other than contempts againſt the ſaid Court*, only excepted, and thereupon ſhall paſs ſentence and decree according as the maritime law, and the law of nations, and the laws of this commonwealth ſhall require.

This act, was also in the year 1780, after the constitution of 1776 was in full operation; and though I admit that this is not a court of record; yet this is an authority given by the common law, having adopted admiralty jurisdiction.

I am now going to shew you, that in this very act, power is given to punish contempts by attachment. Section 5,—*(See Appendix, page 46.)* This is three years, subsequent to the operation of the constitution in 1777; and to shew most emphatically the distinction between the contempt, and the injury done,—between the punishment by summary process, and that of indictments,—it is declared, moreover, that the offender shall forfeit his share of the capture, and that it is to be recovered by indictment. Now, I pray the honorable Senate to consider the period in which this passed, and at that period of time, the same patriotic characters who framed the constitution, formed a part of the Legislature.

This is not a case, sir, that was brought into view by the council of censors. This never met their censure. What then has become of the tortured idea, that "trial by jury shall be as heretofore?" Where is the idea, that no man is be deprived of his liberty, without the law of the land. It *is* the law of the land, sir,—but it knocks up the gentleman's whole theory.

Adjourned till 10 o'clock to-morrow.

THURSDAY, January 17, 1805.

Mr. DALLAS—in continuation.

That I may as soon as possible extricate myself from the embarrassment that I now feel, in consequence of the numerous proofs that press upon the argument, I shall proceed expeditiously in selecting only those that particularly and pointedly apply. When the Senate agreed to adjourn yesterday, I was reading from the late Chief Justice's edition of the laws, page 380, the act for establishing admiralty jurisdiction.

In that law, sir, the right of the Court, to punish contempts by attachments, is recognized as a pre-existing sentment. After having appealed to my honorable opponent, for the accuracy of my remark, that the power of attachment is coeval with the establishment of law in Pennsylvania, as an indispensable appendage; and that the Legislature could find no definition of contempts, except in a general reference to the common law,—I went on to shew that the Legislature, notwithstanding that "trial by jury shall be as heretofore," had by express provisions recognized and given their authority to punish contempts in a

ſummary way, and that this was not confined to the caſe of officers of the Court, not confined to the caſe of witneſſes, not confined to juries, but to the caſe of every perſon who ſhould be guilty of any acts denounced by the law.

If a veſſel is brought into the port of Philadelphia, the perſon bringing the prize, muſt deliver her up to the marſhal of the Court of admiralty, if he does not ſo deliver her up, together with all the documents and papers belonging to her; in ſhort, if he commits one ſingle act againſt the authority of the Court, he has committed a contempt, and muſt be puniſhed by fine and impriſonment. Sir, at that very time, and in the ſame act they declare, in expreſs terms, that the common law juriſdiction ſhall have cognizance of all criminal offences, and that the trial ſhall be by jury; and the Judge of the Admiralty, and the Juſtices of the Supreme Court, or any two of them can hold a Court, for the trial of ſuch offences by the common law.

Will it be believed, that almoſt in the ſame page of this act, which gives the authority of puniſhing contempts, and of proceeding according to common law, the ſame Legiſlature recites the very paſſage in the conſtitution, to which the gentleman has referred with ſo much confidence. The right of trial by jury is particularly acknowledged—Sections 18, 19—*(See Appendix, page 47.)* Good heaven, ſir, can there be any thing more forcible than this? In the very act where they authorize puniſhment for contempt by attachment, they authorize the conſtitutional principle with reſpect to indictments for criminal offences. Let it be ſtill in the view of the Court, that the puniſhment for criminal offences ſhall be by indictment; and and ſhall a Court of Admiralty, which, according to law, is not a Court of record be inveſted with the authority of puniſhing by ſummary proceſs? Is it poſſible that *that* Court ſhould be inveſted with it, unleſs it was with the view of protecting its own proceedings from injury or inſult.

This act of 1780, was in force at the time of the council of cenſors. The manager has brought forward their report. I beg him to refer again to that authority. Let him ſee how far it will avail him.

So far as reſpected the ſhip-carpenters, the council of cenſors complained that this was bringing the Admiralty Court on ſhore, and ought not to be tolerated; but then there is no complaint of this kind, ſo far as reſpects the authority to puniſh out-door contempts. Not a ſingle word is uttered by the council of cenſors on this head.

But, ſir, we perceive ſtill further, that the power of ſummary proceſs, of puniſhing contempts by impriſonment, is veſted

even in a miniſterial, an executive, an accounting officer. This power is veſted in the comptroller-general of Pennſylvania—(*See Appendix page* 47—*Note* Q. Q.) Now, gentlemen, permit me to aſk, where do we find a definition of the word contempt, as firſt uſed in a legal ſenſe. It is certainly a word whoſe meaning is ſomewhere to be found, or it would not have been ſo frequently introduced. Are we to refer to any law of Pennſylvania? No. Can we find it in any ſtatute? No. We are to look for it in the common law alone.

This power, let it be ſtill kept in mind, is a power given after the conſtitution of '76, which declared that no man ſhould be deprived of his liberty, but by a trial by jury, and a due courſe of law. It is a power given by the Legiſlature of Pennſylvania, and if there are times in which the Legiſlature may be obliged to deviate from the conſtitution, there was certainly no neceſſity for ſuch a deviation at this time.

If the conſtitution gives no power to the Legiſlature, the Legiſlature can give no power to the department. But in the caſe I have juſt read, the Legiſlature conſtruing the conſtitution and its proviſions, have thought themſelves juſtified in giving the power. Whenever a principal power is given all the neceſſary powers are given along with it. The "trial by jury as heretofore" was a trial of twelve men upon their oaths. This was the right intended to be preſerved. This is the principal power, and it follows, that any man who prevents the due operation of this law ſubjects himſelf to the power of puniſhment, *inſtanter*, by the common law.

But, ſir, the learned gentleman may ſay, that the individual is not prepared with legal information. That it is not reaſonable that the comptroller ſhould extend this inſtrument of exertion—that it is arbitrary and oppreſſive. Sir, there is no diſtance—no part of the country to which his power is confined. It is co-extenſive with the boundaries of the ſtate.

Sir, I am not wiſhing to enter into a compromiſe with the oppoſite counſel, to ſuppoſe that it was an error in judgment of the Legiſlature to paſs this law. It is upon principles of public policy, that the comptroller has been veſted with this authority. It is neceſſary to the due adminiſtration of juſtice.

Suppoſe that the preſent comptroller-general, and I believe him to be a man of excellent diſpoſition, and good conduct, ſuppoſe that he thinks proper to ſend his ſubpœna to any perſon. The man does not appear. The comptroller iſſues his attachment. He has only to ſay that he "reaſonably ſuppoſed this man poſſeſſed certain information—he did not anſwer to

the ſubpœna—I have brought him by attachment—I thought he poſſeſſed the information I wanted—But he does not—I have ſent him back,—money out of pocket, and time loſt." Such is the power of the comptroller, in obtaining evidence relative to accounts. This power we would reaſonably ſuppoſe, is almoſt ample enough for any object; but we find that it is ſtill more extenſive. Why, ſir, by the 13th ſection of the ſaid act, (*See Appendix, page 48*) if the party live out of the county, upon the mere return of *non eſt inventus*,—that the party is not to be found,—not that he has refuſed to attend,—but merely becauſe he happens not to reſide within the precincts of the comptroller general,—the comptroller may iſſue his attachment, and proceed thereon as if the ſummons had been duly ſerved. He may take him from Pittſburg to Philadelphia.

But what are we to ſay to a law almoſt equal to the conſtitution,—a law made with the expreſs purpoſe of protecting liberty and preventing wrongful impriſonments? What ſhall we ſay, if, in a law ſo ſolemnly enacted, we ſhall find this doctrine of contempts fully eſtabliſhed. 2nd vol. ſtate laws, 241, Habeas Corpus act. This paſſed, ſir, in the year 1785, while the conſtitution declared that right of trial by jury ſhall be as heretofore and ſhall be held ſacred. The preamble to the 1ſt ſection of this law ſtates, that "whereas perſonal liberty is a principal bleſſing derived from free conſtitutions of government, and certain methods of proceeding ſhould be preſcribed, ſo that all wrongful reſtraints thereof may be eaſily and ſpeedily redreſſed." This is the only point in view in that ſection. Now ſir, what does it ſay in the 9th ſection of the ſame act;

"SECT. 9. *And be it further enacted, &c.* That if any officer, ſheriff, gaoler, keeper, or other perſon, to whom any ſuch writ ſhall be directed as aforeſaid, or any of his under officers or deputies, ſhall refuſe or neglect to make the returns aforeſaid, or to bring the body of the priſoner, according to the command of the ſaid writ, within the reſpective times aforeſaid, all and every ſuch officer, ſheriff, gaoler, keeper or other perſon, under-officer or deputy, ſhall be guilty of a contempt of the Court, under the ſeal of which the ſaid writ ſhall have iſſued, and ſhall alſo for the firſt offence forfeit to the priſoner, or party grieved, one hundred pounds, and for the ſecond offence two hundred pounds, and ſhall be and is hereby made incapable to hold or execute his ſaid office; the ſaid forfeitures to be recovered by the priſoner, or party grieved, in manner aforeſaid."

Whence are we to derive the definition of contempt, as expreſſed in this law enacted for the ſpecific preſervation of the liberty of the citizen, and of preventing wrongs? It is not to

be found in any of the ſtatutes,—it is not to be found in the acts of Aſſembly. It is to be found only in the common law.

Sir, there is ſtill more to be drawn from this ſection. It is not only in the power of a Judge of the Supreme Court, in vacation, to iſſue a writ of *Habeas Corpus*, to any officer of the Court, but he may direct it to a private citizen. If he refuſes to comply he is ſubject to a contempt, and fined. What conſtitutes the contempt, ſir? An out-door affair—the man's refuſing to anſwer to that writ.

The worthy gentleman who ſays that every perſon who reads the conſtitution muſt underſtand it, muſt ſhew us how this is reconciled with that part of it which declares that no man ſhall be deprived of his life, liberty, or property without the judgment of his peers? Is it not clear that where the principal power is given, the acceſſary power is neceſſary and goes with it.

Now, ſir, let me carry you to the laws after the conſtitution of 1790, and be it always remembered that although the phraſeology of the two conſtitutions may differ ſomewhat as to this part of our ſubject, yet they both mean preciſely the ſame thing—that *every man ſhall have remedy by due courſe of law*.

The law that I am about to refer to was paſſed in the firſt ſeſſion of the Legiſlature that met after the adoption of the conſtitution of 1790. The General Aſſembly of that day was compoſed of men of virtue and integrity; they were acting on oath; they had before them the conſtitution which had juſt paſſed; and it is not likely that they would wiſh to contravene any of its proviſions. This being the caſe, the managers in 1804 are more likely to be miſtaken, than the Aſſembly of 1791.

This law was paſſed the 30th of March, 1791. The 10th ſection is as follows:

"SECT. 10. *Be it enacted by the authority aforeſaid*, That the auditors aforeſaid, on ſuggeſtion to the Court of Common Pleas that the perſon or perſons to be ſubpœna'd or attached under this act live not in the county where the cauſe is pending, before ſuch auditors, the ſaid Court ſhall have full power and authority to iſſue any ſubpœna or attachment into the counties where ſuch perſon or perſons ſhall ſo reſide, and proceed againſt ſuch perſon or perſons, in as ample a manner as they may do in cauſes pending in ſuch Court againſt witneſſes, or others, who ſhall be compellable to attend in, or be in contempt of ſuch Courts."

Sir, I am advancing fast to that ground upon which the fabric of this profecution is built; and if I am not miſtaken the fabric will ſoon fall over the ears of its authors and be tumbled to the ground. Not on this honorable Senate will it fall; not on the Houſe of Repreſentatives; not on the Committee of Managers; but the lips of the intereſted and angry individual, who is the principal author, will fail to excite attention or reſpect,—at leaſt on this ſubject.

By the ſection I have juſt read the auditor is empowered to iſſue his attachment? Againſt who? Againſt any perſon living out of the county where the cauſe is pending. And the auditors are alſo empowered to proceed as in other caſes of contempt. Now, ſir, every man who has been guilty of a contempt is to be puniſhed by the only rule or authority whatever, and that is to be found in the practice of the Courts of law. Sir, I beg leave to read this ſection again, and the honorable counſel and the managers are requeſted to exerciſe their ingenuity,—not to diſplay their ſophiſtry, in giving an anſwer. [Mr. Dallas here read again the 10th ſection.]

I will juſt read the 2d ſection of the ſame act, to ſhew what other perſons are to be effected by this proceſs.

"SECT. 2. *Be it further enacted by the authority aforeſaid*, That all ſuch auditors appointed by virtue of this act, two of whom ſhall be a quorum, ſhall be, and they are hereby, authorized and empowered to cauſe, by proceſs of ſubpœna and attachment, directed to the ſheriff or coroner of the county, to come before them, as well ſuch perſons as now are, or heretofore have been, or ſhall be, commiſſioners or treaſurers of ſuch county, or employed by or under ſuch commiſſioners and treaſurers, their reſpective executors or adminiſtrators, as all other perſons whom it may be neceſſary to examine as witneſſes, and alſo to compel in like manner the production of all books, papers, accounts and vouchers, relative to the ſaid public accounts; provided no ſuch ſubpœna be returnable in leſs than ten days after the date thereof."

The Senate will pleaſe to obſerve, that this doctrine is the work of a Legiſlature, under the preſent conſtitution; and if three auditors, appointed by the Court, for a ſpecific purpoſe, are to be entruſted with this power, what ſhould be the juriſdiction of a regular Court of Juſtice?

I aſk, ſir, is it a contempt at all, that a man ſhould not live in the ſame county with the auditor or comptroller? But the power is abſolute, and they may attach and puniſh, although no offence is offered to them.

In no charter, in no inſtrument entered into by William Penn were the Courts ever directly inveſted with the power of puniſhing contempts;—but in the Courts of Common Pleas and the Supreme Courts;—the caſe of the Admiralty Courts and of the Comptroller, are all taken by reference to the only article that can explain it,—the Courts of common law. This principle is clearly eſtabliſhed, and was well known to thoſe who framed the conſtitution of 1776, and to thoſe who framed that of 1790.

From the firſt ſettlement of the country it became neceſſary that there ſhould be ſome high controuling authority—that there ſhould be a Superior Court, to reviſe the judgment of the inferior ones. It was abſolutely neceſſary to give ſome ſuch authority. The Legiſlature of Pennſylvania veſted this ſo early as the year 1722 expreſsly in the Supreme Court, and this authority has been granted and recognized from time to time. They veſted in the Supreme Court the ſuperintending, controuling power, and gave an appellate juriſdiction to that Court in as ample a manner as the King's Bench, the Common Pleas, and the Exchequer.

1ſt vol. ſtate laws, 179, ſection 11—*(See Appendix, page 45.)* This ſection merely gives the frame, or organization of the Court. I will now read ſection 13—*(See Appendix, pages 45, 46.)* After giving the inveſtiture, as to the ſubject of juriſdiction in appeals, it proceeds to give the cenſorial juriſdiction —and then it goes on, and explains in which way the general juriſdiction ſhall be exerciſed,—that is, in the ſame manner as the Kings' bench, Common Pleas, and Exchequer may or can do.

Now, ſir, the Legiſlature muſt have had the ſubject of contempt full in view. They do not ſay, that the contempt ſhall be puniſhed in any particular manner—not a ſingle ſyllable on the ſubject—but leaves that to be drawn from the practice of the Courts of King's bench and Exchequer. The Court is to adminiſter juſtice according to law and known practice; all its proceedings muſt be kept pure and untainted. Is it not indiſpenſable then, that it ſhould be veſted with the power of ſummary proceſs, in the ſame manner as the Courts of Weſtminſter Hall? Muſt not the Legiſlature have had this in view, when they granted the powers of thoſe Courts to the Supreme Court of Pennſylvania? No lawyer, ſir, can eſcape from this conſtruction; and I am ſure the honorable counſel will not tell us otherwiſe. He will acknowledge, that the ſuitor ſhall not be deprived of a fair and impartial hearing—that it is the duty of the Court to take care that he has it—to be firm and inflexible in reſiſting any extraneous matter offered to the Court or jury—and to puniſh all attempts to ſubvert the fair and upright adminiſtration of law and juſtice.

In the year 1767 a law was paſſed, that modified the inſtitution of the Supreme Court, ſo as to provide for the appointment of a fourth Judge, and requiring the ſaid four Judges to go to the circuits; but as to the powers of the Court they were placed upon the ſame footing as before. This is in the 1ſt vol. 479.

"*Be it enacted*, That ſo much of the ſaid recited act of General Aſſembly, as relates to the Governor's appointing and commiſſionating three Supreme Judges only, and to the nomination and appointment of the days and times for riding to and holding the Circuit and Niſi Prius Courts in the ſaid counties of Cheſter and Bucks reſpectively, ſhall be, and is hereby declared to be, repealed, null and void; and that there ſhall be four perſons of known integrity and ability, commiſſionated by the Governor of this province for the time being, by ſeveral diſtinct patents or commiſſions, under the great ſeal of this province, to be Judges of the Supreme Court, one of whom ſhall be diſtinguiſhed in his commiſſion by the name of the Chief Juſtice; and every of the ſaid Judges ſhall have all the powers, rights, authorities, juriſdictions and privileges, as are given to the Supreme Judges by the above recited act of Aſſembly; and that the ſaid Judges of the Supreme Court of this province ſhall, and they are hereby enjoined, if occaſion require, to go the circuit twice in every year, into the ſeveral counties within this province, on ſuch days and times as they ſhall nominate and appoint; when and where they, or any one of them, ſhall try all ſuch iſſues in fact, as ſhall be depending in the ſaid Court, and removed out of any of the counties; and generally do, execute and perform, all and every ſuch acts, matters and things, and exerciſe, uſe and put in practice all ſuch powers, authorities, juriſdictions and privileges, as are enjoined and required of them, or given and granted unto them, in and by the ſaid recited act of General Aſſembly."

Now, ſir, here we find them veſted with all the powers, privileges and juriſdictions that they formerly poſſeſſed; and if the power of puniſhing contempts was exerciſed by the Courts of Kings Bench, Common Pleas or Exchequer, theſe Judges were veſted with that power. If I am able to ſhew, (and I am ſure I ſhall be able to do it) that theſe powers were not inconſiſtent with the conſtitution of 1776, nor the conſtitution of 1790, I ſhall then have eſtabliſhed ſufficient ground for the ſupport of my worthy and reſpectable clients.

The 24th ſection of the conſtitution of 1776 declares, that "The Supreme Court, and the ſeveral Courts of Common Pleas of this commonweath, ſhall, beſides the powers uſually exerciſed by ſuch Courts, have the powers of a Court of chancery,

ſo far as relates to the perpetuating of teſtimony, obtaining evidence from places not within this ſtate, and the care of the perſons and eſtates of thoſe who are *non compotes mentis*, and ſuch other powers as may be found neceſſary by future general aſſemblies, not inconſiſtent with this conſtitution.

In the very firſt important act paſſed ſubſequent to the conſtitution, in order to revive and eſtabliſh the Courts of juſtice, the principle is recognized. 1ſt vol. State Laws, 723. Such was the ſtate of things, ſir, while the Supreme Court poſſeſſed merely a cenſorial authority and an appellate juriſdiction.

In the year 1786, in the city of Philadelphia, it was found that the buſineſs of that great commercial capitol had augmented ſo much and produced a conſequent increaſe of ſuits, that the Courts of Common Pleas were unable to perform their duties without much delay and inconvenience. It was at this time that the Legiſlature wiſely provided that the Supreme Court ſhould be inveſted with an original juriſdiction in caſes of fifty pounds and upwards. 2nd vol. Laws, page 492, ſect. 4. (*See Appendix, page* 48.) Here, ſir, we find them again veſted with the power of attachment and every other neceſſary proceſs.

Now, what ſays the conſtitution of 1790? Article 5, ſection 6. "The Supreme Court and the ſeveral Courts of Common Pleas, ſhall, beſide the powers heretofore uſually exerciſed by them, have the powers of a Court of Chancery, ſo far as relates to the perpetuating teſtimony, the obtaining of evidence from places not within the ſtate, and the care of the perſons and eſtates of thoſe, who are *non compotes mentis*; and the Legiſlature ſhall veſt, in the ſaid Courts, ſuch other powers, to grant relief in equity, as ſhall be found neceſſary; and may, from time to time, enlarge or diminiſh thoſe powers, or veſt them in ſuch other Courts as they ſhall judge proper, for the due adminiſtration of juſtice."

Now, ſir, if I ſhall eſtabliſh, to the ſatisfaction of this honorable Senate, that the Courts did exerciſe the power of attachment, by ſummary proceſs, almoſt in the very face of the convention that formed that conſtitution—that Oſwald's caſe was not only known but diſcuſſed in the convention,—and if I prove, by a ſeries of events, that this power has been exerciſed and acknowledged,—I truſt that I ſhall be able to obliterate from your minds every particle of doubt, if any can poſſibly exiſt, of its being a legal and conſtitutional power. Would it not then be unconſtitutional to deprive the Supreme Court for a ſingle moment of this right?

But I will now go on to ſhew that the Legiſlature, immediately after the adoption of the conſtitution, ſo far from attempting to abridge any powers of the Supreme Court, recognized them in the fulleſt extent: In 3d vol. State Laws, page 92, "Sect. 1. *Be it enacted, &c.* That the Supreme Court ſhall be eſtabliſhed in the ſame manner, and with the ſame powers as it hath been heretofore eſtabliſhed by the laws of this commonwealth, conſiſtently with the proviſions made in and by the conſtitution of this ſtate."

Sir, it was diſcovered that another reform became neceſſary in the judiciary ſyſtem—that it was incompetent to the general adminiſtration of juſtice. Accordingly the Circuit Court was eſtabliſhed. This Court carries the authority of the Supreme Court into the counties, only that the Judges have the ſame powers when ſitting in a Circuit Court as in Bank,—and when ſo they have the power of puniſhing contempts.

This, ſir, was after the conſtitution of 1790. It is as late as the year 1799; it was paſſed, I may ſay, almoſt by the ſame Legiſlative authority that are now ſitting here. 4th vol. Laws, page 362. This act declares that "Circuit Courts are to be held by the Judges of the Supreme Court—Appeals to be ſuſtained in thoſe Courts from the Regiſter's and Orphan's Courts, except in Philadelphia county, and the ſaid Circuit Court to iſſue writs of certiorari, habeas corpus, and all other remedial and all other writs and proceſs grantable by the ſaid Juſtices by virtue of their offices, excepting writs of error, and certiorari after judgments, orders or decrees given or obtained."

In the 4th ſection it is declared that the Judges of the Supreme Court, while holding any Circuit Court, are to have the ſame powers, and in as ample a manner as if ſitting in Bank.

Section 3d of the ſame act, after providing for the *teste* and *general* return days, ſtates "That every day of the ſaid Circuit Courts ſhall be good return days of proceſs for ſummoning and obliging witneſſes to appear and give teſtimony in ſaid Court, and ſummoning and enforcing the appearance of Jurors to try iſſues therein, puniſhing *contempts by attachments*, and ſuch other writs and proceſs as the ſaid Juſtices ſhall deem neceſſary for the advancement of juſtice."

There you have proviſion for puniſhing contempts, and of puniſhing thoſe contempts by attachment. This can never be conſtrued to relate to ſuch contempts only as are committed in the face of the Court—it muſt extend generally to all contempts. No Lawyer, no man of common ſenſe can otherwiſe underſtand it.

I now aſk, ſir, does not the fabric begin to totter? Is not the foundation beginning to ſhake under the feet of the honorable manager?

The Judges are to have the ſame powers as when ſitting in Bank. And how are theſe powers to be exerciſed? According to the rules of law in King's Bench, which gives ample authority to puniſh all offences, and particularly contempts.

Sir, I have the moſt perfect reſpect for the conſtituted authorities of our country. I ſhall always conform to their will when duly expreſſed. But, ſir, upon a conſtitutional queſtion, where the Legiſlature are bound by the conſtitution, they are to look into that inſtrument for the authority by which they are to be governed in their conduct; and if they can't find ſome particular authority to act, they have no right to act at all. So far as reſpects the Legiſlature the powers are defined. They are expreſsly laid down in the conſtitution. But ſo far as reſpects the Courts their powers are almoſt indefinite, except as to the common law. They are to explain the acts of the Legiſlature, and they are to explain them according to the common law—by the general principles of the common law—and this common law is to be their guide in the performance of all their official duties.

The Legiſlature, before the conſtitution of '76, had no delegated authority to puniſh contempts. After that conſtitution they had no ſuch authority expreſsly given to them. Nor under the conſtitution of 1790 is any ſuch power declared. They have authority to expel members for diſorderly behavior, to compel the attendance of abſent members. But, ſir, the Legiſlature are to have all the powers that are neceſſary to the Legiſlative authority of a free people—and is it not neceſſary that they ſhould protect their own body from inſult? So far as relates to contempts committed in the face of the Legiſlature this is juſtified by principles of ſelf-defence. But how do they get the authority to puniſh contempts out of their view? They are to have all the powers that are neceſſary to the Legiſlature of a free people. But no man can be deprived of his liberty except by the judgment of his peers and the law of the land. How is this to be reconciled?

But, ſir, we ſhall find that this neceſſary power has been exerciſed in almoſt every ſtage of Legiſlative proceeding.

Before the revolution Mr. Moore and Dr. Smith were called upon for having written an impudent letter to the Legiſlature. They were brought before the Houſe, examined and ſent to jail. This was before the revolution. What has happened

ſince? I well recollect the caſe of Mr. Nicholſon, who wrote a letter to Houſe in which a member, Mr. Conrad Ihrie, was ſpoken of in very free terms. Mr. Nicholſon was alſo fooliſh enough to publiſh this letter. The Houſe called him before them. They made him do almoſt every thing but go on his knees. They obliged him to make the moſt ample conteſſions. And this, ſir, was not a contempt committed immediately in the face of the Legiſlature. It was an out-door contempt.

Again we find the power exerciſed by the Congreſs of the United States. This was in the caſe of Witney and Randal, two land-jobbers. They did not want to offer any affront to the Legiſlature. So far from it, that they wanted to aſſiſt them. They had obtained information of a large body of valuable land. They applied to Mr. Giles and other Members of Congreſs, and opened their caſe. They ſaid to theſe Members, we have diſcovered a vaſt tract of fine land; it is a grand ſpeculation; if you get us a preemption right you ſhall have a fine ſlice of it.

Now we are to recollect that bribery is a crime puniſhable at common law. Witney and Randal had whiſpered their tale in the ears of a dozen of the Members. When one Member mentioned it to another he was told that the ſame offer was made to him. The Members had however behaved with honor to themſelves and to the country. They had proved themſelves above bribery and corruption. As ſoon as the propoſition had been made to them, they had, individually, lodged the information with the Secretary of State. This was the caſe not with one, but with all.

Now, ſir, what did Congreſs do with theſe men. Sir, they pronounced ſentence upon them and impriſoned them. Was this all? No. They did worſe, according to the oppoſite doctrine of the worthy gentlemen—they mitigated the puniſhment; for on the petition of Witney and Randal they ſet them at liberty. Although we cannot ſee where this power was given, yet they dared to exerciſe it. The men having been impriſoned ſome time, and it being agreed that their ſpeculation was loſt, and that no injury could now reſult from the attempt, Witney and Randal were liberated. Now I aſk this honorable Court, where did Congreſs get the authority of impriſoning theſe men? Is it in the conſtitution? No. There is no ſuch power granted there. Where, then, could they get it from?

Again, ſir,—and here I am going to touch on ſlippery ground; but I am not afraid of the conſequences. I hope I ſhall be underſtood, as offering nothing to wound the feelings of the Committee of Grievances or the Houſe of Repreſenta-

tives. I never intend it. But I wish to know whether the Committee of Grievances have not exercised this power of attachment? And if, in doing this, they have erred in judgment, and expect some sympathy, some excuse, I trust that the Judges have equal rights of this kind.

But if, as it certainly is, it is a necessary power, where do the Committee of Grievances get it from? They get it from the House of Representatives. Whence do the House derive it? Do they find it in the constitution? No. How then do they get it but by implication? They are to transact their business, and they must have all necessary powers for that purpose. They are to protect themselves from insult. This is only to be done by their having the power to punish it. Under this view it was that John Nicholson was brought before them; and in the case of Witney and Randal it was necessary to make an example, to shew the people that the Legislature should be free from corruption and should not be tampered with. A Legislator should not only be pure, but should be unsuspected.

I come again to the judicial authority, and to shew that this power is at least as requisite to the Judges as it can be to the Legislature or to any constituted authority whatever—that they derive it from common law—from the law of the land—and from precedent.

In the year 1802 the Judges of the Supreme Court finding that their ancestors recognized this as the law of the land, would have been guilty of a breach of their oaths not to have complied with Mr. Bayard's demand for this summary process. Now I appeal explicitly to the case of the murderers of Pickle where the decision of the Court was solely on the ground of precedent. That they held themselves bound not to depart from it; and I think no person now will pretend to deny that the Judges of the Supreme Court in 1802 were to pursue a similar rule of conduct,—a rule of conduct that has always been sanctioned,—and I trust that the learned counsel will be so candid as to allow that the Judges were bound by their oaths to act precisely as they have done.

Now, sir, I will refer the worthy manager to the first volume of Reports of cases adjudged in the Supreme Court of Pennsylvania, page 333,—Oswald's case. But before I turn to that book I will observe that there are a number of other authorities and decisions besides this which have been recognized in Pennsylvania. There is another case, antecedent to the constitution of 1776 and before the adoption of the last constitution. In April, 1789, a motion was made for a rule to shew cause why an attachment should not issue against Andrew

Brown, the printer of a newſpaper in Philadelphia, and one Mitchel, for a libellous publication. Mitchel had either avowed himſelf or was diſcovered to be the author. Both were brought forward by attachment. Brown ſubmitted to the Court. Mitchel was heard upon interrogatories, and in conſequence of ſeveral extenuating circumſtances, the Judges mitigated the puniſhment. The offenders were fined, but not impriſoned.

The caſe of Bradford, was ſince the adoption of the preſent conſtitution. He publiſhed a paper reſpecting the merits of a caſe then depending before the Court. An attachment was iſſued againſt him. He appeared, made the moſt ample atonement to the Court and party, and at the inſtance of the parties ſuppoſed to have been injured the Court diſpenſed with his puniſhment.

But I have now to ſhew a caſe which evinces the purity and independence of the Judges in a very impreſſive point of view. I believe there exiſts not in the world a man more reſpected, nor perhaps more juſtly reſpected than Biſhop Carrol. Nor is there a more diſcreet, moral man, than the Catholic prieſt of Philadelphia. Mr. Oellers, and a number of Germans determined to build a new church, that which is called the Holy Trinity. They next determined to elect their prieſt and to pay him out of their own purſe. The Biſhop thought it was too much to make it a matter of election and repreſentation, when the appointment was ſolely veſted in the Pope. To this, therefore, Mr. Carrol remonſtrated. He ſaid that it was an innovation upon the authority and the rules of the church, and that it might revolutionize the Pope and the Citadel Imperial.

Mr. Oellers was inveterate. He would not yield. Mr. Carrol then iſſued a licenſe to another Prieſt and in an authoritative manner directed them to induct him. No. This would not do. Mr. Oellers being a good democrat was determined that neither the Pope nor the Biſhop ſhould ſucceed, and they refuſed to receive him. The Clergyman applied for a writ of mandamus, called a prerogative writ, where a man is ouſted of a particular right he is to be reſtored and protected. It is uſed here as it is in England. It is not a ſuit. It is merely a writ of right.

While this mandamus was depending, and the right in ſuſpenſe, Mr. Carrol addreſſed a paſtoral letter to *Bisbop* Oellers —I beg his pardon, *Mr.* Oellers—The Biſhop addreſſed a letter to Mr. Oellers, reproaching him and the veſtry, and pouring upon them all the thunders of the church. The Biſhop, conceiving that he only did a ſervice to the Church of Rome,

directed alſo that they ſhould be excommunicated and publicly denounced.

Mr. Oellers and the others applied for a rule to ſhew cauſe. And, ſir, the rule to ſhew cauſe was granted at once, although Biſhop Carrol reſided in Maryland. He might, ſir, have paid no attention to it. But, upon that being communicated to him, he didn't think it right to avoid a Court of Juſtice—like a virtuous man, he reſpected the laws—he came to Philadelphia, and he and the Clergymen who were inſtrumental in the tranſaction were all brought before the Court.

Sir, there were not gentlemen more reſpectable in the community than were theſe gentlemen. It was not poſſible for the Court to ſuppoſe that they would be wilfully guilty of a contempt of the laws or the Courts of Juſtice. But the Court acted from a pure, unſophiſticated ſenſe of public duty. They paid no reſpect to perſons. The congregation employed learned counſel. The Biſhop alſo employed public counſel. But there did not appear the leaſt diſpute of the power of the Court to proſecute in that way. The paſtoral letter, the denunciations, the thunders of the church were proved. There remained nothing to eſtabliſh the contempt; but as a mitigation it was urged by Biſhop Carrol that when he wrote his letter he never had heard a ſingle word of the mandamus.

Were theſe worthy gentlemen immediately diſcharged? No, ſir. Not at once. The Court held the ſubject under adviſement; and in the mean time the diſpute was adjuſted and withdrawn by the parties.

Theſe worthy gentlemen, although there appeared againſt them not the leaſt ſhadow of intention to commit any offence, muſt and would have been puniſhed for the contempt, had not the ſuitors become fully ſatisfied. This is not directly a parrallel caſe with that of Paſſmore; but I merely ſtate it to ſhew the juriſdiction of the Supreme Court, and the independence with which the Judges exerciſe it. Look at theſe men brought before the Court, in the face of the country and of the world—men of opulence, reſpectability and influence,—men who had not knowingly done wrong. They were ſupplied with able counſel. Yet there was not a ſingle word of queſtion on the ſubject of the contempt, nor of the right of the Court to proceed by attachment. Is there not, ſir, in this, ſomething ſuperior to all that ingenuity can invent, or ſophiſtry ſuggeſt, relative to the queſtion before us?

Again, ſir, we find the caſe of the commonwealth againſt Rolph, an officer of the debtors apartment. In that depart-

ment there are always a great many unfortunate men in want of advice and who are not able to pay for it. They generally apply to the younger part of the profeſſion, whoſe hearts are unfaced by practice, and flowing with the milk of human nature, who frequently give their advice and ſervices without fee. One of the unfortunate objects applied to a young man, juſt entering into the profeſſion. The young man went to the priſon and demanded admiſſion to his client; Rolph told him, he would not let him in. He remonſtrated with him, but he was obſtinate; and again refuſed. Finally, he was obliged to depart without ſeeing the unfortunate man who had ſent for him. This was ſtated to counſel. What was to be done? It was Mr. Edward Tilghman who I underſtand applied to the Court for a rule to ſhew cauſe why an attachment ſhould not iſſue againſt him for a contempt. What did Rolph do? Why, ſir, on the day on which cauſe was to be ſhewn, why the attachment ſhould not iſſue, he came into Court with his attorney, I believe it was Mr. Cadwallader, and did make ſuch an atonement, not only to the young man, the injured party, but to the profeſſion generally, as to induce the Court, with the conſent of the proſecuting party, to proceed no farther againſt him. In the caſe of Biſhop Carrol, the Judges acted from the ſame motive, and were governed by the ſame conſiderations.

There is another authority to which I ſhall refer before I proceed to Oſwald's caſe; it is in the acts of Congreſs. Now, ſir, I know that our municipal laws are not formed in purſuance of the conſtitution of the United States, yet it never can be derogatory to this Legiſlature to conſider the Legiſlative and Judicial proceedings of the United States as worthy of their attention. The diſtribution of the judicial authority of the United States is veſted in Congreſs, by the conſtitution of the United States, pretty much in the ſame manner as that of Pennſylvania is veſted in the Legiſlature. There is not a ſingle ſyllable in the conſtitution pointing at contempts; but, ſir, when the firſt judiciary act paſſed, under that conſtitution the power was given as *neceſſary* to the Circuit Courts:

"SECT. 17. *And be it further enacted*, That all the ſaid Courts of the United States ſhall have power to grant new trials, in caſes where there has been a trial by jury, for reaſons for which new trials have uſually been granted in the Courts of law; and ſhall have power to impoſe and adminiſter all neceſſary oaths or affirmations, and to puniſh by fine or impriſonment, at the diſcretion of ſaid Courts, all contempts of authority in any cauſe or hearing before the ſame; and to make and eſtabliſh all neceſſary rules for the orderly conducting buſineſs in the ſaid Courts, provided ſuch rules are not repugnant to the laws of the United States."

Now, ſir, no conſtitutional authority appears for this—nothing to authorize the inveſtment of this juriſdiction. Yet we find that is given, and we alſo find that it is given in general terms,—it ſays every ſpecies of offence that comes under the nature of a contempt.

It is a remarkable fact, that independent of the caſe of Mr. Duane, frequent caſes occurred, as well under what is called the midnight law, as under the former laws for organizing the Judiciary of the United States. The offence of Mr. Duane, one of the perſons againſt whom this proceſs iſſued, may be conſidered as proceeding from an active zeal to call the attention of the citizens to their rights, and to his anxiety to preſerve the liberties of the people; and yet, though Mr. Duane was impriſoned for thirty days, he never went to Congreſs to complain—the others never went to Congreſs to ſolicit Legiſlative interference, or the impeachment of the Judges.

The only caſe wherein ſuch an appeal has occurred, is Oſwald's, which warrants every principle we contend for. That was before the adoption of the preſent conſtitution. Since that time and before the caſe of Mr. Paſſmore we find no complaint nor any attempt to abridge the power of the Courts as to contempts, although their juriſdiction has been operated on repeatedly.

When Mr. Duane was ſued by Levi Hollingſworth, in the Diſtrict Court of the United States, for a libel, the declaration ſtated him to be an alien. A plea of juriſdiction was put in that he was a citizen of the United States. The preſumption was, that he was born within the limits of the United States; but the Court did not think as I thought, that the evidence was ſufficient to ſupport the facts, and he was declared to be a Britiſh ſubject. After this, a paragraph appeared in another paper, ſtating the caſe in terms highly aggravating to Mr. Duane. He, in return, was ſo imprudent as to publiſh a piece highly cenſorial of the Court and the Jury. It was headed, "*The age of Revolutions.*" The paper containing the offenſive publication was produced in Court, wet from the preſs. I at once declared that I could not undertake his defence, and Mr. Dickerſon acted as counſel for him and defended him very ably, though he was obliged to concede that the Court poſſeſſed the power of puniſhing ſuch offences in a ſummary way. I was reluctantly obliged to decline being of his counſel, for ſuch was the heniouſneſs of his offence, and ſo injurious muſt it prove to the impartial adminiſtration of juſtice, that I could not under a ſenſe of decorum and propriety advocate the cauſe of the perſon, who was ſo palpably guilty of a

contempt. The cauſe was very fully and ably argued, and he was finally declared in contempt by the Court. When the queſtion of puniſhment came forward, there I had no objection to aſſiſt him, and actually took a part in pleading in extenuation. The caſe is reported with great accuracy by Mr. Wallace, in his Reports of caſes ruled and adjudged in the Circuit Court of the United States. *(Wallace's Reports, page 77.)* The arguments of the counſel may be read by any gentleman in his chambers; I ſhall go to the verdict. *(Page* 100.—*See Appendix, note* Z. Z. *page* 66.*)* Mr. Duane upon this rule being made abſolute, appeared in Court in diſcharge of his recognizance, and on enquiry being made if he deſired interrogatories, he replied, by his counſel, that he did not. I leave this caſe to my colleague, and hope he will pay proper attention to it.

Now, ſir, I go to the caſe of the commonwealth againſt Oſwald, and after I have diſcuſſed that important deciſion, I ſhall go to the conſtitutional ground, and I then think I can ſafely ſay that the fatal fabric is down.

It is to be ſeen in what Blackſtone ſtates upon the ſubject—it is to be ſeen in what has been the rule of practice in the Supreme Court, it is to be felt by every man of common ſenſe, that every Court of Juſtice muſt be bound by the precedents and judicial deciſions of thoſe Judges who have gone before them. There muſt have been, on the part of the Legiſlature, either an expreſs avowal or an avowal by implication. With this preface I proceed to read the caſe, and I ſhall then go on to ſhew that it was diſcuſſed in the Convention that framed the preſent conſtitution, and that it was not diſavowed, but confirmed and approved. *(1st Dallas's Reports,* 319.—*See Appendix, note* U. U. *page* 50.*)* I ſhall read the whole of this caſe, becauſe it applies ſo particularly to the preſent queſtion, that not a ſentence ſhould be loſt. No man then thought of impeaching the Judges becauſe they declared the cauſe then pending or not pending, but becauſe Mr Oſwald thought himſelf aggrieved by an arbitrary ſentence of the Court.

[Mr. Dallas here proceeded to read the caſe, and as he proceeded, commented on ſeveral parts of it. He adverted to the interruptions of the counſel by the Chief Juſtice, that "there had been no leſs than three in this caſe, and yet that no complaint had been heard like that which had been coupled with this proſecution." When he came to that part of the opinion of the Court which is deſcriptive of a libeller, he obſerved, that "Mr. Bayard ought to be preſent to hear language ſo appropriate;"—on that part which ſtates that the Court were *unanimously* of opinion that Oſwald's publication amounted to

a contempt, Mr. Dallas remarked, that "in that unanimity would be found the name of a gentleman" (Judge Bryan) "whose memory would last as long as liberty had an advocate in America." Mr. Dallas further observed, that, as in the case of Oswald, the proof of the libel was clearly established by the paper itself, so also the proof against Passmore had been equally clear and satisfactory, and that at all events it was merely a question of law.]

Sir, on the subject of punishment the venerable gentleman to whom I have lately referred, did not chuse to declare an opinion, but observed that he had always entertained a doubt as to the legality of the process of attachment in such cases under the constitution of Pennsylvania. But the Court were afterwards *unanimously* of opinion, that it was not only a contempt but that without the power of punishing such contempts no Court could possibly exist.

With respect to the interrogatories Mr. Oswald misunderstood the Judges—he mistook the whole for an inquisitorial process. He thought that to answer interrogatories was to get from him sufficient information to convict him of the fact charged.

The Court also observed, that "the law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued."

Precisely as in the case of Passmore, the rule, the principle had been decided, and the Court were compelled to determine that he should bend to the Court rather than that the Court should bend to him.

Never was there a doctrine more solemnly considered, nor more notoriously known to every man in the practice of the law—to every Legislator in our country; and what is still more, Mr. Oswald, in the general recollection of his country, was highly respected and esteemed. This case was as intimately known as any transaction in which the citizen himself was immediately concerned. On the 28th of September, Eleazer Oswald presented a memorial to the Legislature, praying for the impeachment of the Judges; before whom, not only the question of the constitutionality of the proceeding, but the question of the nature of the punishment was fully argued, and decided in favor of the conduct of the Court. And now, sir, I turn to the note of the proceedings on that case before the Legislature. I refer the honorable gentleman of counsel for the managers to the opinion of Mr. William Findley, when speaking of the sentence on the point of imprisonment,

which, ſome contended, ought to have been only twenty-eight days, as the record ſtated, that he was to be impriſoned for one month, without adverting to the explanatory words uſed by the Court. Mr. Findley frankly acknowledged, on this occaſion, that error of judgment was not ground for an impeachment. I will not trouble the Court with reading the arguments on this part of the queſtion; but will merely ſtate, that the determination in that caſe reſted as it does in this, until every argument in oppoſition had been thrown down, not by legal ſubtlety, but by plain reaſoning. In Pennſylvania the practice differs, in one inſtance, from what it is in England. You will ſee at once the diſtinction. The Supreme Court has poſſeſſion of the cauſe the moment it iſſues the writ. Now, ſir, in England the practice is different, for there one Court iſſues a writ returnable to another. Now, ſir, becauſe the writ was iſſued the firſt of July and the ſecond was the return day, there are ſome gentlemen to whom I would be loth to aſcribe the idea of ſophiſtry, who were willing to take advantage of this legal ſubtlety.

Adjourned.

SAME DAY, *P. M.*

Mr. DALLAS, in continuation.

Preciſely, ſir, at the place I left off this morning, I ſhall endeavor again to engage the attention of this honorable Senate. I was about to read Mr. Lewis's arguments in the Legiſlature. (*Reads Mr. Lewis's argument.—See Appendix, page 32.*) Now, Mr. Speaker, I beg your attention to the arguments and conceſſions of a gentleman, who was not a Lawyer, but like yourſelf perhaps a farmer. Surely he is not addicted to the arts of ſophiſtry; but a man plain ſpoken and highly reſpected where he lived—a man, who, unleſs he had ſpoken and acted as he did, would not have received that teſtimony, which the gentleman alludes to, year after year, by his election either to the State Legiſlature or to Congreſs. Shall I ſay that I reſpect the honorable member who opened this cauſe, as I do Mr. Findley? That he profeſſes the ſame reſpect for the people as Mr. Findley does? that he is as zealous in developing republican principles as Mr. Findley? and ſhall I not ſay that I will experience from him the candor of Mr. Findley? Will he not concede that this is the proper tribunal to try impeachments for corruption, bribery or wilful and arbitrary infraction of the laws, but not for an error in judgment—that power being veſted ſolely in the High Court of Errors & Appeals. If there has been no proof adduced of the Judges having been guilty of theſe offences, no crime can be ſuppoſed

to exiſt. Sir, I ſay the fabric of this proſecution begins to fall, and when I come to the conſtitutional ground, I ſhall find it proſtrated at my feet. *(Reads a part of the opinion of Mr. Findley—see Appendix, page 35.)*

This, may it pleaſe the honorable Senate, is a very good argument, but not ſtrictly correct. The Legiſlature were not to enquire at that time what was beſt to be done or to be undone, as to general principles. But, as is the duty of this Senate, to decide whether the Judges were guilty or not guilty of corruption, bribery, or tyrannical, arbitrary and wilful miſconduct in the face of the conſtitution and the laws of the commonwealth; and unleſs my learned friend and the worthy manager can make it clearly apparent that they are thus guilty, they ought to be immediately diſcharged.

[Mr. Dallas here proceeded to read Mr. Findley's remarks ſo far as the words "miſtaken judgment of the Court."—*See Appendix, page* 36.]

And now, ſir, this is the opinion of Mr. Findley, a very good man, but not a lawyer. Mr. Findley thought that the Judges, although not liable to impeachment, had, in Oſwald's caſe, been governed by a miſtaken judgment. "Who ſhall decide when Doctors diſagree!" ſays the poet; and he furniſhes no anſwer. But let me aſk, who ſhall decide when Lawyers diſagree? I anſwer, the Judges muſt decide. Whether it was a matter of opinion expreſſed by Mr. Findley in debate that the Judges were miſtaken, is not however very material. We have the caſe before us, and we neither concur with Mr. Findley that it was a miſtake or that it would be a dangerous precedent. If it is acknowledged by the Legiſlature that they ſee error and not crime, this is no ground for impeachment. We are not however to be governed ſolely by the argument or hypotheſis of an individual. Whatever may be the ſtate of party, whatever may be the conceptions even of popular opinion, the Judges are to conſider the law as obligatory on them, and to decide accordingly. "That it was a miſtaken judgment, every man (Mr. Findley alledged) who poſſeſſed a competent ſhare of common ſenſe, and underſtood the rules of grammar, was able to determine on a bare peruſal of the bill of rights and conſtitution."

Firſt Mr. Findley acquits the Judges of any corrupt views, and then he queſtions whether the Judges underſtood the rules of grammar. I think I may, without derogating from Mr. Findley's merit, ſay the Judges underſtood grammar, and I believe much better than Mr. Findley. Nay, I will anſwer that grammar was much better underſtood by the Judges, (I ſpeak with deference to this body) than by this honorable Court.

I now hope I have gotten to what I think is where my worthy friend, the manager, has found the word "ſophiſtry," and I think the candor of the gentleman will induce him to acknowledge it. "With theſe aids he defied all the ſophiſtry of the ſchools and the jargon of the law, to corrupt the explicit language of the text; and therefore he regretted that in liſtening to the ingenuity of Mr. Lewis's paraphraſe his admiration was not neceſſarily followed by conviction." Here again I find where the worthy manager who leads in this buſineſs, has formed the ground of his argument; but, ſir, the reſpectability of the authorities we have given muſt render this plea inefficient. So many caſes might be produced in oppoſition to his doctrine on this head, that they could not be reduced to print in the compaſs of ten thouſand folio volumes. This ſhews, ſir, that every man ſhould allow another credit in his profeſſion according to his merit. The maxim is, let the cobler ſtick to his laſt. Now, ſir, the very moment that Mr. Findley leaves the plain path that he has ſet out on as a Legiſlator and gets to the law, he ſeems totally loſt. There a ſtudent who has been but ſix months in an attorney's office would know better. I aſk what is the nature of contempt? I aſk the manager, the Houſe of Repreſentatives, and every man verſed or not verſed in the law, to ſay as to the ſpecies of contempt to which this ſummary proceſs ſhall be applied? Where is the power to diſcriminate? Where ſhall we find the rule of diſtinction? One will ſay it ſhall be as to caſes in the face of Court; another may ſay to caſes out of Court. It applies to both ſays another. If this is the caſe it is probable that the counſel for the reſpondents and I will diſagree. Who ſhall decide when Doctors diſagree? But who are to decide if my learned opponent and myſelf diſagree? With the utmoſt reſpect to his talents and candor—with the utmoſt regard to that honorable gentleman, I ſay that a twenty-five years ſearch and enquiry have clearly impreſſed me with my preſent opinion of the law on this ſubject, and I confidently hope that from his knowledge and experience he will be of the ſame ſentiment with myſelf. If we differ, who will decide then? Suppoſe we agree and the Judges differ? Who will decide then? Can there be a queſtion in the mind of any man? Who but the Judges are to decide on queſtions of law? But if the Judges act corruptly or tyrannically in the performance of their official duties, then puniſh them by an impeachment; but in the name of God do not puniſh them becauſe this gentleman and I differ in opinion, and do not ſay that error of opinion is puniſhable as a crime? I truſt that we ſhall diſcover a more liberal ſpirit of toleration.

Mr. Findley's theory does not agree with mine, nor with that of the Judges.

" Mr. Findley, however, admitted that caſes did exiſt in which it was neceſſary for the ſake of juſtice to empower the Judges to exerciſe a ſummary authority." And ſo did the Committee of Grievances who generated this buſineſs, admit that there were ſuch caſes. We therefore only differ as to the ſpecies of caſes to which the ſummary proceſs ought to be applied. If we can't agree, is that a matter of crime? And if the Judges diſagree in this caſe with the opinion of the Committee of Grievances or the Houſe of Repreſentatives, in the name of God is there any man of common ſenſe who will ſay that if they have acted without corrupt, baſe or arbitrary motives, they ought to be impeached?

My worthy friend, which he has been for upwards of twenty years, turns lawyer, and I muſt tell him, " my good friend you are very wrong, unleſs you go a little further and take a view of the adminiſtration of juſtice; and you do not grant me my conſtitutional privilege, unleſs you conſider and allow that ſuch power ſhall be placed in the Courts, that I ſhall have remedy by due courſe of law."

" With reſpect to the argument offered by Mr. Lewis, that as *attachments* had iſſued in Pennſylvania before the revolution; and as the 24 ſect. of the conſtitution, declares, that the Courts ſhall have all the powers which they uſually exerciſed, therefore the power of proceeding by *attachment* is confirmed, Mr. Findley obſerved, that the fallacy of this interpretation would be notorious, by recollecting that the laſt ſentence of that very ſection ſtipulates, that ſuch powers ſhall not be inconſiſtent with the conſtitution. Nor would he admit the inference which had been drawn from the next ſection, that ſays, " trials ſhall be by jury as *heretofore*;" for, he ſaid, it appeared by its context and immediate ſubject, that it related to the forms and modes of proceeding upon the trial, and not to the caſes in which the trial ought to be allowed."

Here then again Lawyer Findley is completely miſtaken. In the two conſtitutions proviſion is made, not only for the trial but the form of the proceedings being as heretofore. When he ſpeaks the language of common honeſty and common ſenſe, we all underſtand him perfectly; but when he goes to the law, he goes out of his depth, and although I have not now the opportunity of ſpeaking to himſelf perſonally, yet I would not heſitate to ſay to him that ſome of his expreſſions on this ſubject may have done conſiderable miſchief.

" Having expatiated, with great energy, upon the different points of the conſtitution, which the ſubject brought into view; having aſſerted the right of every man to publiſh his ſentiments

on public proceedings; and having urged the dangers of permitting the Judges, by implication, to puniſh for offences againſt themſelves (obſerving, that if it was a contempt to write, it was alſo a contempt to ſpeak of a cauſe depending in the Courts) he concluded with intimating, that he ſhould take an opportunity of ſubmitting a reſolution to the Houſe, which might ſerve to avert the pernicious conſequences of allowing the caſe of Mr. Oſwald to grow into precedent."

Now, ſir, here is a touchſtone. The Judges decided the caſe of Paſſmore in 1802 as men bound to take notice of every thing which could ſerve as a precedent or a rule of conduct, and who were in full poſſeſſion of preciſe information reſpecting this caſe of Oſwald. Now, ſir, theſe gentlemen find that Mr. Findley, however patriotic, however well minded he might have been, ſaid that he wiſhed to prevent Mr. Oſwald's caſe from growing into a precedent. But, ſir, they alſo found that the Legiſlature diſcuſſed the ſubject, and the reſult of the enquiry of the Legiſlature of Pennſylvania was that it ſhould be a precedent, for they negatived Mr. Findley's propoſition to the contrary effect.

"Mr. Fitzſimons, a member from the city of Philadelphia, now moved the following reſolution:

"Reſolved, That this Houſe, having, in a committee of the whole, gone into a full examination of the charges exhibited by Eleazer Oſwald, of arbitrary and oppreſſive proceedings in the Juſtices of the Supreme Court againſt the ſaid Eleazer Oſwald, are of opinion, that the charges are unſupported by the teſtimony adduced, and, conſequently, that there is no juſt cauſe for impeaching the ſaid Juſtices.

"The propoſition contained in this reſolution, gave riſe to a ſhort but animated converſation. On the one hand, it was ſaid, that, in admitting that there was no ground of impeachment, it was not intended to concede, that the facts repreſented in the memorial had not been proved: and, on the other hand, it was anſwerred, that if there had been proof that the memorialiſt, according to the complaint, "was immured in priſon, without even the ſhadow of a trial, for an imaginary offence," it would have been the indiſpenſable duty of the Legiſlature to vote for an impeachment. A compromiſe, at length, took place, and the committee of the whole agreed to report the following reſolution:

"Reſolved, That the charges exhibited by Mr. Eleazer Oſwald againſt the Juſtices of the Supreme Court, and the teſtimony given in ſupport of them, are not a ſufficient ground for impeachment."

"But when this report was called up for the decision of the House, it was postponed (and consequently lost) on motion of Mr. Clymer, in order to introduce the resolution originally proposed by Mr. Fitzsimons in the committee. Mr. Findley then claimed the attention of the members, and after a judicious introduction, presented the following resolutions to the chair, to supercede Mr. Clymer's motion.

"Resolved, That the proceedings of the Supreme Court against Mr. Eleazer Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the Court, nor against any officer, or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the Supreme Court, and respecting some of the Judges of said Court, was an unconstitutional exercise of judicial power, and sets an alarming precedent, of the most dangerous consequence, to the citizens of this commonwealth.

"Resolved, That it be specially recommended to the ensuing General Assembly, to define the nature and extent of contempts, and direct their punishment.

"An interesting debate arose upon these resolutions, in the course of which, much that had been said in the committee was repeated, and many new ideas were suggested, upon the general question of the jurisdiction of the Court in cases of attachment. With respect to Mr. Findley's propositions, that gentleman ably supported them upon the spirit of the constitution, and the expediency of the thing itself. But it seemed to be satisfactorily answered by Mr. Lewis, 1st. That the Legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which is the natural and exclusive province of the judicial branch of the government: and 2dly, That the recommendation to the succeeding assembly would be nugatory; for the Courts of Justice derive their powers from the constitution, a source paramount to the Legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter.

"Mr. Findley's motions were lost by a considerable majority; and Mr. Clymer's revived resolution, adopted by the House: Yeas 34. Nays 23."

Now, sir, we find that here the decision of the Supreme Court in Oswald's case was fairly brought before the Legislature, and maturely considered. Although Mr. Findley's candor operated on him, and obliged him to concede that the Judges were not impeachable for a mere error in judgment;

yet he thought this an error of judgment and an unconſtitutional exerciſe of power. But, ſir, the Legiſlature did not think that it was even an error of judgment; and much as I reſpect Mr. Findley, much as I reſpect his political opinions, yet I am only to be governed by the final vote of the majority.

I have then, ſir, not only the authority of the Supreme Court of Pennſylvania, but the authority of the Legiſlature of Pennſylvania, to ſupport the doctrine for which I contend. It muſt appear obvious that here the queſtion was brought fully and fairly to the teſt, whether the exerciſe of this power was conſtitutional or not. Let us never ſet the example, to be actuated in our Legiſlative deciſions by party conſiderations. I am ſure that this honorable Court cannot be operated on by views of that kind. It ought to be indifferent whether or not that Legiſlature was or was not a federal body. So far as reſpects putting this queſtion to the teſt, it is ſufficient that it was the ultimate vote of the Legiſlature;—the full and fair expreſſion of the repreſentatives of the people ſworn to ſupport the conſtitution of the ſtate.

My learned friend I am ſure loves the conſtitution and the laws under it; and I am ſure that he loves the opinion and will ſubmit to the authority of the Legiſlature; he will ſay at once that ſo far as it reſpected the opinion of the Legiſlative body, it was final and concluſive; and that the effect it attended on the Supreme Court of Pennſylvania, was imperative; it was an opinion that ſanctioned and gave full ſtrength to the precedent, upon which was founded the deciſion that gave riſe to this impeachment.

Sir, I feel pained that I am not interrupted in this buſineſs by ſome acknowledgment. Were it not for the opinion of my worthy friend, Mr. Findley, I would not heſitate to ſay that no man of common underſtanding could be miſtaken for a moment. The Court will pleaſe to recollect that the conſtitutions of 1776 and 1790 are the ſame in language and meaning as to the law of the land, the trial by jury, and the general rights of the citizen, except that the laſt conſtitution is more explicit.

I have now, ſir, before the honorable Senate, not only the deciſion of a Court of Juſtice, but the deciſion of the Legiſlature, with a full and complete view of the ſubject before them. And are the Judges of the Supreme Court not to follow this precedent; or if they do, are they to be impeached becauſe their predeceſſors in office did, on their oaths, declare, that ſuch was the law? and which declaration the Legiſlature of Pennſylvania, upon the footing of the conſtitution and the law, inſtead of denying, moſt ſolemnly confirmed? Are the

Judges to be impeached for this? God forbid, that ever I ſhould be tempted to look for a ſeat on the bench under ſuch reſtrictions! And let it be remembered, that if every little conjectural error of judgment, or even every trifling offence, is to be conſidered as ground for removal, there is not a man of talents, integrity and feeling who will attempt to ſerve the public in that or any other official ſituation.

It is in vain to ſpeak of the bulwarks and barriers of the conſtitution, if ſuch reſtrictions are to be laid on the Judges, and if this honorable body ſhall chooſe to eſtabliſh itſelf as a High Court of Impeachment on the imperfect repreſentations of individuals. We know perfectly well how far the appeal to the people, of that honorable gentleman, is intended to operate; but let it be remembered, that if we mean to diſcharge our duty, the powers of government are not only to be kept diſtinct; but we are not on trifling pretexts to deſtroy the tenure of an office held during good behavior.

However the deciſion of this Houſe may operate on the minds of the people, is not now a queſtion. The Senate are to decide agreeably to their oaths and their conſciences, whether the Judges have acted in a wilfully corrupt and arbitrary manner. I ſay, let them have erred upon the law,—even upon the queſtion of purgation—where, let me aſk, where can be found the authority to impeach them for it? Sir, it is now put upon the judgment of the Senate to aſcertain, not whether the Judges have erred on a point of law, but to decide whether they have wilfully violated the conſtitution. I do not admit of any acknowledgment that the Judges of theSupreme Court of Pennſylvania have erred in their conſtruction of the law. I have a perfect reliance on their judgment as well as on their general intentions.

But now, ſir, I come to the deciſive poſition which I mean to take in this argument. I aſk whether the current of the Legiſlative acts—the current of the judicial deciſions of our Courts, have been annulled by the letter or ſpirit of the conſtitutions of 1776 and of 1790? I ſay they have not; and if I do not prove it by a demonſtration as irreſiſtable as that two and two make four, I commit myſelf as having miſtaken not only the power of the facts I poſſeſs, but of the powers of my own mind, as preſented to the view of this houſe.

Every perſon, when he enters into ſociety, ſurrenders a portion of his perſonal rights to the community, for the protection and ſecurity of the whole. With this preface I will come immediately to the ground of my argument on this point. Under our conſtitution perſonal liberty is to be preſerved and

enjoyed; but it is to be preserved and enjoyed agreeably to our laws.

According to the doctrine of my worthy friend, the manager, there can be no arreſt of the perſon at all. Both in civil and criminal cauſes, how does the caſe ſtand? and what is the meaning of the conſtitution? If a man enters into a contract with another, which he breaks, and the injured party brings his action; it is an action of debt; and the law ſays the creditor may arreſt him, that he has power over his liberty. But what ſays the ſupreme law of the land? "No man can be deprived of his liberty but by the judgment of his Peers? Is that the caſe? Well, if he cannot find bail, he muſt go to priſon. He lies there, although he may not owe the man a farthing, becauſe he cannot find bail for his appearance. For cauſe of bail is one thing, and cauſe of action another. And yet the conſtitution ſays, no man ſhall be deprived of his liberty, without the judgment of his Peers, or the law of the land. In criminal matters, how ſtands the buſineſs? A man can be arreſted and committed on the ſuppoſition of his having committed a crime; although, in other caſes, the accuſation requires the ſupport of an oath. No warrant can iſſue unleſs on oath. Nor can a man's houſe be ſearched unleſs the ſuſpicion is ſpecified on oath. I give this to obviate the wonderful generality of the obſervation thrown out by the manager, that in no caſe whatever can a man be committed to jail, or the liberty of the citizen be taken away, without a trial by jury. A man goes to jail, waits for a trial, and even though he may be innocent he is thus obliged to ſurrender a portion of his liberty for the general ſecurity of ſociety.

I beg it to be underſtood that the rights of perſon, of property, and of reputation, were as well protected in the colony of Pennſylvania as they can be in the ſtate of Pennſylvania, or as well as my worthy friend can ſuggeſt. I declare, with reference to the knowledge of every man who hears me, that there does not appear to have been a State, in which private property and reputation were better ſecured than in the Province of Pennſylvania. Security for perſonal rights, for property, and for reputation, were not the things that we contended for; they were not the objects of the revolution; becauſe we know that every thing was as ſecure then as it is now, under the auſpices of thoſe who were the guardians of the law. What was the motive of the revolution? The proud ſpirit of liberty—the proud and honorable ſpirit of independence which burſt upon the minds of the coloniſts. However happy the preſent day might be, there ſhould be no temporiſing, no ſpeculative views on this ſubject. All the world knows that the revolution did not ariſe from actual oppreſſion, nor from arbitrary laws, for they were re-

pealed; but because the British government had declared that they would not give up their disputed authority to tax our industry. The first law operating in this way was passed, I think, in 1763 or 1764. This was the first attempt, and this law was repealed soon after, with a declaration, that they had the right of taxing us. The gentleman is therefore mistaken in his theory. I know it, sir, previous to the revolution, only as a matter of history. Many gentlemen who hear me, know it as a matter of fact, and to them I appeal for the correctness of my statement.

Well, sir, the revolution took place and generated the necessity of a form of government, to supply the one we had cast off. Then it was that the immortal Franklin, with his compeers, assembled to give us that form of government which we received in our first constitution of 1776. So far as respects the bill of rights, the magna charta furnished the most of its provisions, though they were applied with all the caution of those who introduced them.

Then it was declared, that any law, whether called statute law, law of assembly, or common law, must be considered as the law of Pennsylvania, until altered or supplied by a legislative act.

Now gentlemen I have given you the ground which I shall endeavor to stand upon. Before the constitution of 1776 the Courts of Justice had various powers; some of common law jurisdiction, some of equity; nay, some of canon law jurisdiction; so that in many cases that flow dignity, which marks the trial by jury, was dispensed with. Before the revolution, in civil matters, Justices of the Peace had jurisdiction only in cases not exceeding five pounds. Now they have more extensive jurisdiction. With respect to civil matters the power is much changed from what it then was. In criminal matters two Justices of the Peace had acquired power by law to try even cases in petty larceny, and this law was not repealed till some time in 1785, '86 or '87.

Now, sir, independent of the authority just shewn, another consideration presents itself—a summary process could only cure the evil which it embraces; in cases at law some causes will admit of delay and others will not, and the right of the discrimination is a privilege of the Court. But if a man who is an important witness to a cause, should refuse or neglect to attend, he can be compelled to attend by summary process. Without this compelling power the Court cannot proceed. You will find this principle recognized in every constitution that exists. Go to magna charta, and you will find what is the difference between a *judgment by his peers* and *the law of the land*.

Again, if a man is guilty of profane ſwearing, upon information being given to a Juſtice of the Peace the man may be ſent to jail by the Juſtice, if he does not pay the fine impoſed by law on ſuch offences. But for the exhauſted ſtate of my own ſtrength I would diſcuſs this part more fully. Again, ſir, and the moſt extraordinary thing is, that it is the law of Pennſylvania at this moment, notwithſtanding the conſtitution ſays, "no man ſhall be deprived of his liberty or property without the judgment of his peers or the law of the land."—Even, now, ſir, look at the vagrant act. A ſingle Juſtice has the power by a law of the Legiſlature to ſend a man to jail for thirty days! I intended to turn to the act itſelf, but I find the evening advances faſt upon me, therefore ſhall leave the Senate to refer to it at leiſure.

In all theſe inſtances of criminal juriſdiction, the deciſion of the magiſtrate was omnipotent. In the caſe of petit larceny, as late even as 1785 or '87, the Juſtices of the Peace could ſend a man to jail and puniſh him without a trial by jury. Shall this be allowed to petty magiſtrates and not allowed to a Court of Juſtice? What, ſir, ſhall the firſt Court of law in the ſtate be reſtricted from the exerciſe of ſummary juriſdiction, and a ſingle magiſtrate maintain ſuch power over the perſonal liberty of the citizen?

In the Court of Admiralty, the Orphan's Court, and the Regiſter's Courts, (except in the act of 1780, authorizing the trial by jury in capital caſes on the high ſeas) we went on before this without the trial by jury, and yet that was never complained of; and I think before this argument is cloſed, I ſhall be able to ſhew that it is ſtrictly conſtitutional and proper.

Now, ſir, it is not inconſiſtent with the *ſpirit* of the conſtitution of 1776, that this ſummary power ſhould be poſſeſſed by the Judges. With its *terms*, it is impoſſible to ſay that it is inconſiſtent. Its terms expreſsly ſay, that "trial by jury ſhall be as heretofore." Let it be remembered that in the conſtruction of this inſtrument, as well as in the conſtruction of every other inſtrument, we muſt conſtrue it ſo, as that one part will explain the other, and by that means conſtitute a complete explanation of the whole. Now what does the conſtitution of 1776 ſay? "Nor can any man be juſtly deprived of his liberty except by the laws of the land, or the judgment of his peers;"—but "trial by jury ſhall be *as heretofore*." Now what is the meaning of this? That wherever it had been practiſed, in all ſuch caſes wherein it had been uſually exerciſed, it muſt be continued—and on the contrary, in ſuch caſes wherein the courts had been in the habit of proceeding without the trial by jury, they ſhould proceed as uſual. If a

contempt was to be punished by a trial by jury, the gentleman would be obliged to shew an instance where a trial by jury had been allowed in a case of contempt, or that the constitution provides for the case; he would be obliged to shew that common law recognized such a mode of proceeding; for the common law as far as it is applicable, is as much the law of Pennsylvania as the laws made under the constitution. This is the exposition of every lawyer, and the legislature, when they decided on Oswald's case, understood it so and acted in conformity to it. If I understand this passage, it means that you shall not try causes by a jury that were not formerly tried in that way; instead of that you shall proceed as has been the practice *heretofore*. This passage comprehends all cases, either under the constitution or the common law.—We find here, that we have the common law and the constitution in our favor, for neither the one or the other says you shall try a contempt of court by jury.

In construing any instrument incoherence and absurdity will follow if we only take a part and do not consider it as a part of the whole.

How can the gentlemen conceive that the *law of the land and judgment of his peers* meanthe same thing.—Let us see: No mans liberty shall be effected but by the *law of the land*. Now, sir take this separately and what is the meaning of it? That the liberty of the citizen shall be protected. But where is the trial by jury which the framers of the constitution meant to secure, in most cases. That may be taken away by a single law. This then would be inconsistent with their views. But taken as a part of the whole, or taking the whole together, it is no longer discordant. "No man shall be deprived of his liberty, except *by the judgment of his peers* OR the law of the land."

But now, sir, to descend more into detail with this proposition. The trial by jury shall be *as heretofore* What does this mean unless it refers to the subject instead of the formality of the trial; becaufe in the constitution of 1790 it is intended to provide for the whole of jury trial as it had been heretofore exercised. They certainly meant that, or else the gentleman must tell me, that all that has happened through the medium of the Orphan's Court, the Court of Admiralty or the Register's Court, is unconstitutional and illegal. You all hold your property under the Orphan's Court, and if the proceedings of that Court have been unconstitutional, you would hold it by a very bad tenure; and any man could recover it from you by producing an antecedent title. Now either this is the case, or the gentleman must shew me from whence this power is derived.

Then I ask him, where does he find it? The gentleman, perhaps, will ſtill inſiſt upon jury trial in *all* caſes. He differs from me, and I differ from him. Doctors may differ and who ſhall decide;—lawyers may differ and the Judges muſt decide.

Now, ſir, I will briefly recapitulate what were the ſubjects of a trial *without* a jury before the revolution. All caſes in the Orphan's Court, the Regiſter's Court, the Court of Admiralty, the High Court of Errors and Appeals, which had civil and criminal juriſdiction. The Judges of the Supreme Court, in caſes of outlawry, had common law juriſdiction. In all theſe caſes, before the conſtitution of 1776, the proceſs was uniformly without a trial by jury. And I tell you, that coeval with the exiſtence of theſe proceedings, coeval with the eſtabliſhment of Courts of Juſtice, the ſummary power of puniſhing contempts by attachment has been in practice; and this too, for out-door contempts. When I do this, I want the honorable manager and the Committee of Grievances to tell me what entitles them to ſay that this power of puniſhing contempts by ſummary proceſs, has been qualified and done away. I want them to tell me how this power is veſted in the Legiſlature. Is it veſted in the Committee of Grievances? Is it veſted in the Houſe of Repreſentatives? No! No!—If Mr. Fry* will give me a law for his ſummary practice of compelling the attendance of witneſſes, I will be thankful.

I will now turn to the two remaining articles, on which I mean to make ſome comment; and I ſhall not detain the honorable Senate much longer, as I am ſenſible of the indulgence I have already experienced. Now, ſir, I will ſhew that ſince the conſtitution of 1776 theſe powers have been recognized. [Mr. Dallas here referred to 3d vol. State Laws 536, 4th vol. do. 351 and 6th vol. do. 375, to ſhew that the juriſdiction of Juſtices of the Peace, had been periodically extended as to actions of debt and damages—and the Juſtices authorized in certain caſes to commit defaulters to the jail of the county.] So that without any written authority this honorable Houſe has placed theſe powers in the hands of an individual magiſtrate, under no controul or ſuperintending authority; and all this, ſir, without the trial by jury; and where, ſir, does this honorable Houſe, ſitting in its legiſlative capacity, find authority to iſſue attachments? Where does it find the power to veſt the juriſdiction, above-mentioned, in Juſtices of the Peace, unleſs it is to be found in precedent? I do not refer to this with a view to call in queſtion the validity of thoſe proceedings; far be it from me, ſir, to ſay that this Houſe have not the power to do thoſe things. Sir, this extenſion of the power of Juſtices of the Peace has gone ſo far that you have not

* The Serjeant-at-arms of the House of Representatives.

only enlarged the ſum, but the ſubjects of litigation; and you have done all this according to precedent. Sir, when the amount of the ſum in controverſy does not exceed fifty-three dollars and thirty-three cents, you decide without appeal. Why, what is the conſequence? that you have transferred the juriſdiction from the juries to the magiſtrates. Now I do not mean to ſay that this honorable Houſe were not warranted in taking theſe meaſures by any thing contained in the conſtitution. I hope they will perfectly underſtand me as meaning no ſuch thing.

Now, ſir, as to criminal juriſdiction of Juſtices of the Peace; I could refer to a variety of acts in which this ſummary power is permitted in certain caſes. [2*d vol. State Laws* 457.—*See appendix, note* S. S. *page* 48.] I will hurry them over as faſt as I can, and will not detain this Houſe longer than I can well avoid. Now this act paſſed ſince the conſtitution of 1776, which declares that trial by jury ſhall be as heretofore. No man is to be impriſoned without a trial by jury. This is the doctrine declared by the manager. [Reads] They are to pay a fine, and, poor devils, they may not have the ſum to pay with. Now, ſir, we all know that thoſe perſons who are obnoxious to the penalty of this act are generally poor perſons; and four dollars for ſabbath breaking, or five ſhillings for an oath, or five ſhillings for every days inebriety, is to the poor individual of as much importance as fifty dollars to ſome, or five hundred or five thouſand to others. But for all this, ſir, they muſt abſolutely pay it, or go to jail, *without* a jury. And this is a caſe where the law does not operate upon the rich as well as the poor. The rich man is always able to pay; but the poor man cannot always do it; and if he does not, then it is in the power of the magiſtrate to commit him to jail for a certain number of days, notwithſtanding the worthy manager has ſaid that no man can be deprived of his perſonal liberty without a trial by jury. Did the poor man who ſwore the oath, or the poor man who broke the ſabbath, or he who got drunk, commit ſo great an outrage upon juſtice as Thomas Paſſmore did? And yet all this pity is for Thomas Paſſmore, whilſt we have never heard a ſingle exception made to this juriſdiction of the Juſtices. Now, ſir, there are a deſcription of perſons in all communities, who may be termed diſorderly men; but ſtill they are men and frequently they are citizens, and their offences are ſtill more the reſult of their misfortunes than of their faults. The liberty of ſuch men is however perfectly at the diſcretion of the magiſtrate; and this under the law exiſting ſubſequently to the conſtitution of 1776 and to that of 1790. But, ſays the worthy manager, "nothing but trial by jury can deprive a man of his liberty."

Again, ſir, my apprentice becomes negligent or affronts me; what does our act ſay? Why, ſir, I have only to make my

complaint to the Juſtice, and on my ſingle oath, he has authority to confine that boy in jail for thirty days. Every ſervant is ſubject to the ſame puniſhment. And yet we are told that a trial by jury is to be had in all caſes.

A poor unfortunate race of little blackguards—chimney ſweepers—what is the cruelty of their treatment? Poor miſerable wretches, how were they treated by the laws, ſince, as well as before, the conſtitution of 1776! The general diſpoſition of thoſe who own them is of the moſt ſavage and unrelenting nature. If the maſter ſhould not be ſatisfied with flagellating his boy, he may, on complaining to a magiſtrate, conſign him to a priſon on bread and water. Where, then, is your trial by jury in this caſe?

Is there an inſtance to be adduced, in which the Legiſlature have interfered, in a caſe of this kind? No inſtance can be found. And I ſhould bluſh, ſir, if, after referring to theſe acts of the Legiſlature, I ſhould be anſwered, "all that you get by this, is, that the Judges and the Legiſlature have acted unconſtitutionally."

The poor pedlars are a ſet of men who carry on a walking, itinerant trade—they are men who do not keep a fixed or ſettled ſhop; and although their dealings may be fair and honeſt,—although they may have no intention to do evil; yet whenever a Juſtice of Peace finds one of theſe pedlars ſelling his goods, and that he cannot produce a licence, he may commit him; it is the Juſtices intereſt to do this; becauſe by doing ſo he accumulates his fees.

But now, ſir, I come to a very ſolemn caſe indeed, which was decided without a jury, notwithſtanding that the conſtitution declares in ſuch commanding terms, "trial by jury ſhall be *as heretofore*." That precious gift of providence, life, itſelf, is immediately implicated. Before the revolution, and previous to paſſing the penal law of this State, there exiſted in Pennſylvania a proceſs of outlawry. That proceſs began againſt any perſon who was charged with an offence, and who, on proceſs being iſſued againſt him, was not to be found. Whether his abſence be accidental or not, is not enquired into. But if it ſo happens that charged on oath with the perpetration of the crime, the law ſuppoſes that he has abſconded with a view to evade the law. The Attorney-General tranſmits a bill to the Grand Jury—the bill is found againſt him—Capias is iſſued—the man is not to be found—perhaps he may have buſineſs that has called him to Allegheny or to New-York or to ſome other diſtant place. Then commences the detail of the proceedings under the act of outlawry. This gives no immediate notice. Proclamation iſſues requiring him to ſurrender himſelf for trial

within a certain time, or he will be outlawed. Now it is poſſible that buſineſs, accidentally, may have led him away from the ſcene of the tranſaction, and he is ignorant of the proceedings againſt him. Well, ſir, after going through the ſpecified period of time, the abſent perſon is judged attainted, though he may not be guilty; yet as he did not appear, judgment is declared by the Court, and nothing remains but execution. Well, ſir, this man is totally ignorant of all this.— He returns. He tells the Juſtice he will ſurrender and take his trial. But this will not do, ſir. The Juſtice arreſts him and he is now committed to jail, without any trial by jury! At the next Court the man is brought up—not for trial—not for judgment —but for an award of execution. Whether he had or had not been guilty is not taken into conſideration—no evidence, even of an *alibi*, can be received—no evidence of innocence can be admitted—nothing but the power of pardon can reſcue him from the hands of the executioner. This was a poſitive law before 1777, and when the Legiſlature revived the former acts of Aſſembly, it was among the number of thoſe put again into operation. It was ſo conſidered and declared by the Judges, that the law was adopted as in full force and operation by the conſtitution of 1776.

Now, ſir, I am not ſpeaking theoretically; I think I can ſhew, that the proviſions of this act have been in practice; and that ſo late as the year 1786, men who had been outlawed were executed in Pennſylvania, without a trial by jury. The Legiſlature will, no doubt, remember the caſe of the Doans. Theſe men, who had been outlawed, were arreſted and thrown into priſon; they implored a trial by jury. The friends of theſe men,—for debaſed as they were, (and there was no doubt of their crime,) they ſtill had friends,—excited an intereſt in their favor, even in the Legiſlature. Motion after motion, and reſolution after reſolution, were introduced, not to procure a pardon, not to reverſe the outlawry, but merely to obtain for them a trial by jury. The Judges were applied to for this purpoſe by the Executive Council; but they would not take one retrograde ſtep; they were bound to conform ſtrictly to the law; and they ſtated it was only neceſſary to enquire whether theſe were the perſons mentioned in the outlawry; that they could not be admitted to the benefit of a trial by jury on the merits of the caſe; they could only be heard as to the identity of their perſons. The outlawry is in itſelf a judgment. They had only to award execution. When the Doans applied to the Legiſlature for a law granting them a trial, by jury, a bill was zealouſly ſupported for this purpoſe, but twas finally loſt. And here Mr. Findley and Mr. Smilie, who both had read and underſtood the conſtitution, were perfectly convinced that theſe men were not entitled to a trial by jury, and therefore they

would not agree to give them "falſe grounds for their hopes." Did theſe gentlemen heſitate to ſay that this was a caſe in which the trial by jury could not be admitted? Is not this, ſir, an additional proof of the acknowledgment of the common law by the Legiſlature of Pennſylvania? Well, what did Mr. Dickinſon, the author of the celebrated Farmer's letters, than whom I do not believe there was a more active republican, a lawyer, politician and ſtateſman,—what did he do? He went ſo far as to remonſtrate with the Judges, as to irregularity or impropriety in ſome of the proceedings, and to queſtion the Judges as to the law; but they anſwered, "we have proceeded according to law. We will not act otherwiſe. That alone is our guide." The correſpondence will be found in the firſt volume of Caſes decided in the Supreme Court of Pennſylvania [Dallas's Reports, page 86.] [See Appendix, note T. 4; page 87.] Now, ſir, what was to be done here unleſs you ſay, that the executive department ought to have iſſued a pardon. This alone could have ſaved them, but this was not done. Thus you ſee, you have in Pennſylvania, even executed a man without a trial by jury.

When the conſtitution ſays, "Trial by jury ſhall be as heretofore," it means only as to ſuch caſes as have been uſually tried heretofore by a jury; and in ſuch caſes as have not been tried ſo before, they ſhall not be tried ſo now. Surely the gentleman will not ſay, that it only applies to the form and not to the ſubſtance.

I grant that in emergencies many things may be done which in other times ought not to be tolerated; but they muſt be borne with, although the intereſt of the people may ſuffer a temporary inconvenience.

Now, ſir, what were we to do with an attainder law in Pennſylvania, if no man was to be deprived of his liberty or property without a trial by jury? By thoſe attainders, which are iſſued agreeably to the authority given by the Legiſlature, two operations are produced. In the firſt place they immediately affect the property of the perſon attainted; and in the next place, if after a certain time the attainted perſon does not come in and ſurrender himſelf for trial, they proceed *ex-parte* againſt him. If he ever afterwards enters Pennſylvania, his life is gone.

I remember the caſe of Mr. Reynold Keen whoſe name was inſerted in a bill of attainder; before the expiration of the time he ſurrendered himſelf—he recanted the error, and his name was expunged. But, ſir, another may be gone to a diſtant ſtate.—to Europe—to Kamſchatka. He may hear nothing of the attainder. Notwithſtanding this, he is not only to loſe

his property immediately, but his life on his return; and all this without a trial by jury.

I refer you to the minutes of the Assembly with respect to the case of the Doans. It occurred, I think, in the year 1785.

During the revolutionary war, how was it in cases of attainder? Were they not in frequent operation, although in some cases they may have operated peculiarly hard? Indeed I can find nothing to justify the proceeding, but the exigency and badness of the times, when public difficulties were industriously encreased.

Now, sir, what is to distinguish the cases of contempts which have occurred in the intermediate epoch, between the constitutions of 1776 and 1790, from the others which I have mentioned? I want to hear that. But, says the learned manager,—(I must call him learned, because he disdains the law)—"we have the authority of the Council of Censors in favor of our position, that all the burden of their song was, the violation of the trial by jury." If, sir, he had listened to that song as I did at the time it was sung, his opinion might have been very different. Is there in their report any censure pronounced on the law of outlawry, on the general powers of the Court of Admiralty, of the Orphan's Court, the Register's Court, or any other Court, for exercising the summary process that we speak of? No, sir, it was simply this, that wherever there had been an attempt by the legislative authority to blend the executive and judicial duties, their censure was directed against it as a violation of the constitution. Another cause of censure was, that there had been an exercise of important jurisdiction over property without the trial by jury, and this was as to the admiralty, in bringing the cases of libels, and demands of carpenters and other artificers, on shore; and certainly such a jurisdiction was never intended by the constitution. But, I repeat it, that in no instance whatever, has the Council of Censors arraigned this mode of summary process nor of the judicial powers which had been usually exercised, without the intervention of a jury; though one of the Judges of the Supreme Court, who doubted the constitutionality of the power, was present, and I believe, drafted the report of the committee. This, therefore, will not answer the purposes of the learned manager.

I now proceed, sir, after this general view, to consider the constitution under which we now happily live. But it amused me not a little when the learned manager told you that the motive for calling a convention to revise the constitution, was to give greater security to the rights of the citizen. You, Mr. Speaker, and I, know the whole history of that day. No sooner had the then republican party, as they called themselves, obtained a small majority in the executive council, than in that body they labored

to promote the call of a convention; they were not only hoſtile to the conſtitution, but it ſeemed that, like Hannibal to the Romans, they had ſworn everlaſting enmity to it. They appeared in conſiderable force in the Houſe of Aſſembly, but at firſt were over-ruled by a majority. However they continued to labor day and night to have a convention called. Notwithſtanding, Mr. Whitehill, Mr. Smilie, Mr. Piper and other conſtitutionaliſts oppoſed all their ſtrength to the propoſition, and to the principle generally, yet was the republican party, as it was then called, the Federal party as it is now called, finally ſucceſsful.

However, at the next meeting of the Legiſlature, much to the diſappointment of this party, their memorials were ſubſcribed by a very ſmall body of the people; perhaps not more than one to a thouſand. Well, ſir, they ſay ſomething muſt be done. We muſt not be defeated. We muſt purſue the object until it is accompliſhed. And what did they do? They entered into a compact, ſelf created ſociety, and it ſo happened, that at that time, a majority in the Legiſlature were federaliſts—they prepared an addreſs, in which they talked of the rights of the people to alter the government;—of a ſingle Executive—and a Legiſlature of two branches, but not a ſingle word of adding greater ſecurity to the rights of the citizen as to trial by jury or any thing elſe. The next ſtep they took was to paſs certain reſolutions declaratory of their ſentiments in favor of changing the frame of government, and recommending the ſubject to the conſideration of the people. A worthy man, Mr. Wright, who, in the firſt inſtance, voted with the republicans in favor of the reſolutions, here changed his opinion, and entered his reaſons on the Journals of the Houſe. Well, ſir, after all this, our friends the conſtitutionaliſts, as they were called then—the republicans, as they are called now, alſo entered their reaſons of diſſent againſt the reſolutions.

I want to ſhew you, ſir, how your name ſtands in that ſituation of public affairs, and what were the ſentiments of our friends at the time. [*Appendix to the minutes of the convention, page* 203.]

"We diſſent for the following reaſons:—

1. For that the conſtitution of this ſtate has wiſely provided for a peaceable and orderly reformation of our government, if it ſhall be thought to require it, by a council of cenſors, who are to be elected once in every ſeven years, and whoſe ſtated time of election and meeting will be in the next year: and although we admit that in our government, as well as in all others, the community hath a right to reform, alter, or abolish the government, in ſuch manner as a majority of the people ſhall think right; yet the people themſelves are ſufficiently able to judge when the neceſſity of a revolution ſhall arrive; and we think it highly improper, to ſay no more, that the ſervants of the people, appointed under the conſtitution, for the purpoſe of maintaining, ſupporting, and executing the conſtitution, who are bound by the ſolemnity of an oath to maintain

the rights of the people, as declared in the constitution, should undertake a measure like the present, which is evidently calculated, as far as the power and influence of this house can extend, to subvert and destroy the constitution.

II For that every government acquires respect and force from age, and the people are more disposed to obedience, more pleased and more happy, when, added to the authority of laws, their government has acquired the sanction of ancient examples, and the veneration which all men are disposed to pay to the opinions and practice of antiquity; and it is therefore of infinite consequence to form a good constitution in the beginning, and to adhere to it when formed. Frequent changes in government naturally destroy that respect which is so esssential to its weight and energy; one change leads to another, and frequent changes are too apt to end in the contempt of laws, confusion and anarchy, even where they are effected in the most peaceable manner: but this is not all—the precedent established on this occasion will be introductory of a fluctuation in the principles of government; its consequences may be feuds and factions. As few revolutions are brought about without bitter and lasting animosities, contentions and violence, we cannot apprehend that anticipating one single year, or even two years, in the attempt to change the form of government, is worth the endangering the peace of the community, and the risque of bringing all government into irreparable contempt."

Admirable leſſon! Supreme wiſdom!

Now, ſir, was not my worthy friend, the manager, a little miſtaken in his poſition, in appealing to our political enemies? as we meet not one ſingle word or ſentence in the reſolution, ſupporting his ſtatement. Sitgreaves, Ogden and James Roſs, were among the zealous ſupporters of the new ſtate of things. So the burthen of the ſong, and the ſong itſelf, was not the greater ſecurity of the liberties of the people, if I underſtand the phraſeology aright. My worthy friend, the manager, muſt not underſtand it, or he jeſts with me.

And now, Mr. Speaker, as to the laſt ſtage on this point; I will proceed to ſhew that the convention who ſat in a few months after the deciſion of Oſwald's caſe, were apprized of that circumſtance. They were called upon to attend to the liberties of the people,—they were poſſeſſed of full, and, in fact, unlimited powers; to correct the errors, or prevent the repetition of any abuſes that might have been diſcovered under the exiſting form of government. We all recollect that this convention was compoſed of men eminent for their patriotiſm, learning and integrity—it was among others compoſed of William Findley, of the honorable Speaker, of William Lewis, who was the Attorney in Oſwald's proſecution, and of Thomas M'Kean who was the then Chief Juſtice. I appeal to every one who was preſent in the field of diſcuſſion in that convention, to produce one ſingle inſtance where the deciſion in Oſwald's caſe was conſidered as an infringement of the conſtitution. On the other hand, I confidently aſſert that it was uniformly conſidered as the law of the land, and conſequently as the law of Pennſylvania.

The next thing in order that I ſhall turn to, is the proceedings of the convention. I may then turn to my learned friend for his opinion, and I think he will ſay that the fabric has completely fallen down.

Adjourned.

FRIDAY, January 18, 1805.

Mr. DALLAS—in concluſion.

When my worthy friend, the manager, appeared to me to be mounted on ſtilts, I wonder he was not a little apprehenſive of the ſlippery weather. A ſingle remark on his obſervations on the motives for calling a convention. It is not very ſtrange that thoſe perſons who he ſays were ſo eager to obtain greater ſecurity for the liberty of the citizens, ſhould have been the political opponents of that gentleman?

In the legiſlature, under the conſtitution of 1776, it required more than a mere majority to conſtitute a quorum; and is it not extraordinary, that finding a majority in favor of calling a convention, the friends of the worthy manager, your friends, Mr. Speaker, and my friends took a ſtep to fruſtrate their wiſhes. The ſtep the took was ſuch as I could not approve; for finding that unleſs ſome of them attended, a conſtitutional quorum could not be formed, they determined to abſent themſelves from the houſe. They abſented themſelves accordingly. In this ſituation a mob of young gentlemen federaliſt, went to the lodgings of Mr. M'Calmont and Mr. Miley, forced them to the houſe and kept them within the walls until the vote could be taken on the queſtion for calling the convention. Theſe gentlemen federaliſts, in order to ſave their country from a blow which they apprehended was pending, committed an outrage, not only on the privilege of legiſlators, but on the ſacred rights of the citizen, which the manager has ſaid they were only anxious to ſecure more permanently.

But I proceed to the ſubject I was on laſt night. However I beg leave firſt to quote another reſpectable authority on the ſubject of contempt. Mr. Jefferſon it is well known is endeared to every patriot, and the ſecurity and happineſs of the people has always influenced his enlightened mind. Mr. Jefferſon makes the ſame diſtinction by neceſſary implication, if not by direct aſſertion, which I contend for. [*Jefferson's notes on Virginia, Rawle's edition* 423.]

"In all cauſes depending before any court, other than thoſe of impeachments, of appeals, and military courts, facts put in iſſue

shall be tried by jury, and in all courts whatever, witnesses shall give testimony viva voice in open court, wherever their attendance can be procured: and all parties shall be allowed counsel and compulsory process for their witnesses.

"Fines, amercements, and terms of imprisonment left indefinite by the law, other than for contempts, shall be fixed by the jury, triers of the offence."

Sir, I now proceed to the ground which was in discussion when the adjournment took place last night. But first let me call your attention to the difference between the language of the constitutions of 1776 and 1790. The constitution of 1776 says, "that in all prosecutions for criminal offences the party shall have the right of being defended by counsel, of confronting the witnesses, and a speedy public trial by a jury of the vicinage." It has been argued that by the language of the constitution of 1776, trial by jury was preserved in all criminal cases whatsoever.

What are the terms of the analogous provisions on the subject in the new constitution? The constitution of 1790, says, "in all criminal prosecutions the party shall be heard by himself and counsel, and in prosecutions by indictment, he shall have a trial by jury." The departure from the constitution of 1776, was by way of elucidation, and I think you will find that they go into an express definition. It says, "In all criminal prosecutions, (whether by summary process or otherwise,) the party shall have the benefit of counsel, the right to confront witnesses," &c. and then it goes on to say "that in all prosecutions by indictment or information there shall be a trial by jury." Here then is a departure from the constitution of 1776, the cause of which I will shew presently. No man who understands grammar, no man who reads and understands the English language, can have a single doubt on the subject. The accused shall have the benefit of counsel; compulsory process to obtain witnesses in his favor, and of confronting his accusers face to face. These are the rights of men and of citizens, in all criminal cases, without exception; and in all cases by indictment or information there shall be a trial by jury. Contempts of court have never been proceeded against by indictment. No instance can be produced.

Let me then, after this explanatory preface, read the words of the two constitutions. *Constitution of* 1776, *Bill of Rights*, *Section* 9. [*See last page of appendix.*]

The language of the present constitution of Pennsylvania, is also to be found in the *Bill of Rights*, *section* 9. [*See last page of appendix.*]

Sir, he that runs may read, and here I will agree with my worthy friend, the manager, that every man who holds the book in his hand can understand the meaning. Now is there in the power of language any thing more plain or clear? I say, is it in the power of language to be more express or explicit on a subject of this kind, than this is? Trial by jury shall not be in *all* cases, but it shall be in cases of indictment and information. By the constitution of 1776, it is declared, that in controversies respecting property, and in controversies between man and man, the trial by jury shall be held sacred. Now, sir, although the language in the constitution of 1790 is different, yet it is different only as to phraseology. It is merely rendered more explanatory. How does the constitution of 1790 express this provision? It says that all courts shall be open, and every man shall have his remedy for injury sustained in his person, property or reputation, by a due course of law. Then what is the consequence of this due course of law? If by the pre-existing state of things, we are to ascertain what is the due course of law, shall we not find that the common law was in constant use, and was the common course of remedy for injury to person or to property. In the constitution of 1776, bill of rights, section 11, the words are, "That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury which ought to be held sacred." In the constitution of 1790, the expression will be found in section 11, thus, "That all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, as the legislature may, by law, direct."

Why this diversity of expression, if there was not a wish to make what was doubtful before, no longer exist as a doubt? Why change the form of the expression, unless it was to meet the actual state of things that has arisen. This must have been the view of the framers of the constitution. I implore you, sir, in the name of common sense, to declare, what other reason could there be for this diversity of expression, but that the doubts which might have arisen under the constitution of 1776 should be forever set at rest. The constitution of 1776 says, "that the trial by jury shall be as *heretofore*, and it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, return, or appointment of jurors."

But, sir, what says the constitution of 1790? It says that "trial by jury shall be as heretofore and the right thereof remain inviolate." It does not go into as superfluous a detail as the constitution of 1776 does; because the legislature would not have performed the duty of electing jurors; as it is a particular duty of

the legislature, with a constitutional injunction, to preserve the summoning of jurors and the trial by jury free from corruption. It is here said it shall be recommended to the legislature to do that which it is their duty to do. I shall not read the preamble to the constitution of 1776, among which are some old and sound maxims; but I am going to see what particular rights, man, as an abstract member of society, is entitled to. He is entitled to no right or privilege but what society has conferred on its members generally.

I am going to see what was the meaning of the convention on this subject. The learned gentleman and the worthy member will permit me to read, not with a view of indulging eloquence as to the rights of man, nor with a view of indulging sophistry in the defence of my clients; but the manager has endeavored to shew that the sole object in forming the new constitution was the greater security of personal liberty. Now we know that this was not the sole object. The pretences urged for calling the convention of 1789, were to lessen the burthens of government, to render it more secure, and more conformable to the constitution of the general government. But one of the principal objects was to get the government out of the hands of those who had held the administration of it, and to advance the political views of others. These things are known to us all, and I have the benefit of speaking in the hearing of many who were active partakers in those political transactions. But, notwithstanding the several changes that have taken place, I contend that all the powers of the court, that existed before the revolution, exist at present. Some doubts had arisen with respect to the trial by jury, and a principal object was to render this subject more clear and explicit; and this, together with the causes I have stated, produced the ultimate downfal of the old, and the establishment of the new constitution. I will merely refer to section 5, of the declaration of rights of the constitution of 1776. "That government is or ought to be instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community."

Now, sir, let us take this as our guide; the thing is defined, and unison and harmony follow. Those were the declared views of the friends of the present constitution; but if greater security to the liberties of the citizen was the sole object, I beg the worthy member to put his hand upon the single place in which it is expressly named as the principal motive.

The honorable court will permit me to repeat that the case of Oswald had been decided by the legislature, and had therefore become a precedent; that the then chief justice who had presid-

ed on the trial of the case, Mr. Findley, Mr. Lewis, all, all those gentlemen were in the convention that followed the legislature before whom the decision was made. They all knew this decision had taken place. Now, sir, the first important proceeding of the convention, was the appointment of a committee of nine to draft a new constitution; this committee made their report; and that report, as to trial by jury and prosecutions in criminal cases, was precisely in the terms of the constitution of 1776. [*See Minutes of Convention, first session, pages 45 and 46.*]

They afterwards reported, according to the terms of the same constitution, that the supreme court besides the powers already exercised, shall have the powers of a court of chancery, as to obtaining witnesses and perpetuating testimony.

Now, sir, the committee of nine have reported the full and fair expression of the constitution of 1776, for the consideration of the convention.

If, sir, the convention were disposed to think differently, and had determined that the principles of the constitution of 1776 should not prevail. In fact, if they could have devised any mode of proceeding, in cases of contempts other than by attachment, we should have found that Mr. Findley and his friends would have been for excluding all those parts of the constitution of 1776, under which the power could be exercised, and would have endeavored to modify the new constitution so as to obliterate the doctrine of contempts altogether. If, on the other hand, it was necessary to rescue the clause, from any supposed ambiguity, we shall expect to see motion after motion made to that effect.

With respect to the clause giving chancery powers to the supreme court, Mr. Findley, who argued very ably in common matters, and did not fail, except in his endeavors to turn lawyer, supported the motion to strike out the words "beside the powers heretofore usually exercised by them." [*Minutes of the Conventon, page 157.*]

"The sixth section of the fifth article being under consideration;

"A motion was made by Mr. Sitgreaves, seconded by Mr. Gallatin, to strike out the words "*beside the powers heretofore usually exercised by them.*"

Well, now, sir, this was on the 16th of August 1790. This motion was made in the second session of the convention; after they had, by adjournment, an opportunity of consulting the public opinion.

Well, sir, what was the object of the mover and seconder of this motion? I infer it from the words used and which were moved to be struck out; and it could have been merely to put it to the test whether the law that gave this power should exist or whether it should be struck from our law books.

"On the question—"Will the convention agree to strike out the said words?"—it was determined in the negative, and the original section adopted."

I pray my learned friend and the honorable senate to pay particular attention to this case. Notwithstanding the exertions of Mr. Gallatin, you find the convention declaring: "no, the thing shall stand as it is, and all powers heretofore exercised by the supreme court, shall continue to be exercised by the same court, and we affirm, that whatever doubts may have arisen on this question, shall no longer exist." Away with all doubt now; for the very people themselves have declared, that whatever may have been the pre-existing state of the law, shall continue to exist for the good of the people.

Is it not very extraordinay that Mr. Gallatin wished to introduce into the 9th section of the bill of rights, after the word "vicinage," these words: "without the unanimous consent of which jury he cannot be found guilty," and the convention declared that such words should not be introduced. [*Minutes of the grand committee, page* 86.]

"A motion was made by Mr. Gallatin, seconded by Mr. Smilie, to insert, after the word, "*vicinage*," the following, viz.—"*without the unanimous consent of which jury, he cannot be found guilty.*"

"On the question—"Will the committee agree to insert the same?"—it was determined in the negative."

When this very section was under debate in the committee of nine, the word "*indictment*," was introduced in the first line, in lieu of the word "*criminal*," so as to make it read in all prosecutions by indictment, &c. This essentially changed the meaning of the section, for it was obvious that if the report had stood in this way, a trial by jury must be had in all cases. But it was afterwards transposed, the words "criminal prosecutions restored," and the section so arranged that in cases of indictment only, the party had a right to trial by jury.

The draft was reported without it at first—it was inserted in the committee of the whole—altered to its original state in the convention—again inserted in the grand committee, and after-

words amended so as to read as it does now; "and in prosecutions by "indictment or information," *only*, a speedy public trial by an impartial jury of the vicinage." They had likewise in the committee expunged the word "criminal," and this also was restored. [*Minutes of the convention, page* 121.]

"The ninth section of the seventh article being under consideration, viz.

"That in all *prosecutions by indictment*, the accused hath a right to be heard by himself and counsel; to demand the cause and nature of the accusation; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and a speedy public trial by an impartial jury of the vicinage; nor can he be compelled to give evidence against himself; nor can any man be deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

"It was moved by Mr. Lewis, seconded by Mr. James Ross, to insert the word "*criminal*," before the word "*prosecutions*," and strike out the words "*by indictment*," and to insert, after the words "*favor, and*," the following: "*in all proceedings by indictment to.*" The amendments were adopted."

Now, sir, here is the same Mr. Lewis who supported the doctrine in the supreme court, coming forward to try its expediency in the convention. I mean, that he put it to the test, shall it or shall it not be recognized; and the result was that it was a necessary power and ought not to be abridged; trial by jury was therefore, not allowed to the party in all cases. He shall in criminal cases have compulsory process to compel the attendance of witnesses in his behalf, to meet the witnesses face to face, and to have the benefit of counsel; but he is only entitled to trial by jury in cases of indictment or information. This is the inevitable construction of this passage, and it explains unequivocally the meaning of its authors.

Mr. Smilie who probably concurred with Mr. Findley on every subject in which the rights of the people were involved, called for a division of the question.

"A division of the question on the said amendments was called for by Mr. Smilie, and the same being taken, the amendments were adopted."

Sir, nothing more favorable to the doctrine we contend for could be produced than this. The convention are not now making a constitution, but they are expounding a constitution. They have clearly explained the provision, and the judges are sworn,

as well as the senate and house of representatives, to support and administer the constitution according to its legitimate meaning. Mr. Wilson, to whom I have said we are more indebted, than to any other man, for the democratic features of our constitution, wished a modification so that it might read "*prosecutions*" instead of "*proceedings.*"

"A motion was then made by Mr. Wilson, seconded by Mr. Atlee, to reconsider the last of said amendments, viz. "*in all proceedings by indictment to,*" and in lieu to insert the word "*prosecutions,*" which was determined in the affirmative." [*See Appendix, note D. 3. page* 68.]

Sir, the very manner in which they moulded their expressions seems to evince their intentions to remove all doubt and ambiguity. Now, sir, I refer to the constitution as it existed at the close of the first session of the convention. This was the constitution exhibited to the people during the recess of the convention. I beg the senate to refer to it in order to enable them to see the shape it stood in at the close of the first session of the convention. *Bill of Rights, section* 9. "That in all criminal prosecutions the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment, a speedy public trial by an impartial jury of the vicinage. That he cannot be compelled to give evidence against himself; nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land."

This, sir, was the form of the section at the time when the adjournment took place, in order to afford the people at large an opportunity of expressing their sentiments on the several provisions of the proposed constitution. Trial by jury was reserved in criminal cases only where the offence was indictable. The ninth section had been arranged so as to harmonize with what had been the practice heretofore. This was a necessary provision for the actual state of the country, and the due administration of the laws.

Sir, the summary jurisdiction of the courts of justice was perfectly known—there was not a member of the convention but must have known of the summary jurisdiction of justices of the peace, in various cases, such as fines for profane swearing, drunkenness, and the summary punishment of vagrants, &c. who, if they did not pay their respective fines, were to be imprisoned for a month, and so on; and this jurisdiction of the justices of the peace must have been forever suspended, if the trial by jury

had been allowed in all cases. Therefore the spirit of those gentlemen was to conform to whatever had been the practice of our courts of justice; and they amended it accordingly.

It was not out of the view of the convention that the orphan's court had no jury—that the register's court had no jury—that the court of admiralty had no jury. These gentlemen, knowing these things must have been weak indeed, sir, or they must have been profligate and wicked, if they had permitted this provision to remain doubtful. It would have been a criminal neglect if they had not guarded against doubt and ambiguity. The manner in which it now stands is affirmative of the jurisdiction of the supreme court. You see at once that the negative carries with it the affirmative proposition; they do not merely say "we will not deny them this proposition,—we will be silent and confirm it,"—but we find them employed in removing all doubts that might have been heretofore entertained.

Now, sir, the adjournment of the convention took place, and the subject was committed to the people at large, and the people with all the sense and information of those who represented them, afterwards confirmed it. There was not a little circle of twenty men in any part of Pennsylvania but were perfectly acquainted with the cause of Eleazer Oswald, and no member of the convention could have acted with fidelity if he had not stated to his constituents the operation of this provision. The convention adjourned for the purpose of giving the people a more full and complete opportunity of expressing their opinion of the proposed plan of government; they say to the people, you have it in your power to express your opinion on every part of this proposed frame of government, and if any parts of it are not conformable to your wishes, you may have them altered, amended or abolished. In the second session of the convention, not a single attempt is made to touch this proposition, except the single instance made by Mr. M'Kean, of adding after "*indictment*," the words "*or information*," and that was only to render it more explicit. During the recess not a single objection is heard—not a whisper of complaint from the people. The convention very reasonably infer, that the silence of the people is an argument in its favor; and they adopt it as a part of their will.

In the second session of the convention, page 161 of their minutes, you will find them adopting this clause without a single exception; there is no yea, no nay, no motion for amendment, although they have just returned with all the advice and information collected from among their constituents.

"The ninth section of the ninth article being under consideration, the same was adopted as follows:

"Section 9. That in all criminal prosecutions the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and, in prosecutions *by indictment*, a speedy public trial by an impartial jury of the vicinage," &c.

Now, sir, we see that the convention, after a lapse of six months, and after every thing had been done to encourage deliberation and inquiry, declare that this shall be a part of the constitution—that it is the law of the land. Not only this, sir, but all those who had been of an opposite opinion, acquiesced in the measure. We have not only their silence, but their open acquiescence in favor of the provision.

I now come to the final completion of the 9th section. [*Minutes of the convention, page* 188.]

"A motion was made by Mr. Smith, seconded by Mr. Lewis, to reconsider the ninth section of the ninth article, in order to insert after the word "*indictment*," the words "*or information.*"

"On the question—"Will the convention agree to reconsider for the aforesaid purpose?"—it was determined in the affirmative, and the section, as amended, adopted."

Am I, sir, justified in what I have said? Am I justified in saying that this common-law power, this punishment of contempt by summary process, as a part of the law of the land, is completely recognized by the convention?

We may receive benefit by looking at another section of the constitution. The convention were perfectly aware that there were offences which were not punishable by indictment, but yet it was essential, not only to the peace and welfare of society, but to the very administration of justice itself, that they should be punished. *Constitution, art.* 9. *sec.* 10.

"That no person shall, for an indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

The gentlemen of the senate will please to recollect, that here *information* applies to the case of a magistrate or public officer, for malconduct in office, in which case, trial by jury is excluded. Now, sir, whatever might have been the ingenuity in conceiving, and the reasoning and "sophistry" of Mr. Findley in advocating his doctrine, that *the law of the land* was merely a diversity in the mode of expressing "*judgment of his peers*—that what was disjoined, he chused to unite—and that the word *or* was a word without meaning; whatever may have been his reasoning or ingenuity on this subject, it is unavailing, because it cannot be supported upon any tenable ground.

Not alone by law but even by history we have an account of the origin of this provision. Hume in his history of England gives you the precise words. They are the same as are used in the British magna charta. The worthy manager spoke of the constitution of 1776. The constitution of 1776 called for the prosecution by indictment, and drew no distinctions like those which are drawn in the constitution of 1790. The present constitution is explicit. It declares those cases where the general powers are to be preserved, and those where the right of trial by jury is to be enjoyed. The ambiguity of the old is remedied in the new constitution. But even under the old constitution the distinction is sufficiently plain to authorize the full application of our doctrine; and for this I am sure the candor of the learned counsel will induce him to say that the contemporaneous adjudications of our courts of justice ought to be considered as of some authority. The judges have decided on those principles, in cases where the tongue of malice could not attain the slightest ground for censure. I allude to the celebrated case of Bishop Carrol. Here, sir, the judges acted with their usual independence; they did not retire into a corner, nor hide themselves in a bushel. They were steadfast in the seat of justice. Thus we see, that antecedent to the case of Thomas Passmore, they had acted upon the same principle, and they did not act secretly. Of course they had to be governed by that principle in his case. Can it be said that the judges have not acted upon fair, upright and independent principles, and upon the untainted suggestions of their best judgment have declared that this is the law of the land?

Sir, the case I have mentioned was in the view of men of patriotic minds, and how many would have been found to call the judges to an account, if they had not been assured that it was the law of the land.

Now, sir, what does the constitution of Pennsylvania say on this subject? It says, that in every case where a man is accused of a crime, he shall have the benefit of being heard by himself and his counsel—of confronting his accusers, and of compulsory

process for obtaining witnesses in his favor,—he shall have these advantages in *all* cases,—and *in cases of indictment or information* the benefit of a trial by jury; but if the action is not by indictment or information and if heretofore trial by jury was not the mode of investigating things of this kind, he must not have a trial by jury—he shall only be entitled to what was the pre-existing process.

It is in vain, sir, to disguise the attempts that have been daily appearing, through the medium of the press, to warp the minds of this court on this important question. In particular, there was a publication in an Eastern paper calculated to raise prejudices in the minds of this honorable court. Other papers have been circulated with equal zeal for this purpose. For my part I have not thought it necessary to notice them further, than to apprize this honourable court of the dangerous consequences that may result to the due administration of justice, if such publications are permitted.

How am I to shield myself from the influence of such publications? How am I to counteract their dangerous tendency? When I am standing up before a jury, and if I find them prejudiced against my client in consequence of out-door statements and insinuations, what are my feelings then? Why, it is not in the power of man to obtain a fair and unprejudiced hearing, or justice for his client.

In the case of John Fries, of whose counsel I was, in conjunction with Mr. Lewis, a publication appeared in one of the daily papers threatening our personal safety for appearing as the counsel of that unfortunate man. If there had not been room to suppose I should injure the cause, and ultimately encrease the danger of my client, I should instantly have moved for a rule against the printer, nothing else could have prevented me from applying for an attachment. Under such circumstances, sir, before a court of common law, the minds of the jury tainted with prejudice and warped by impressions of well written essays on one side or the other,—no matter on which side the prejudice is, created,—it will be impossible for the ablest counsel to eradicate it from the minds of such a jury. Through the medium of the press, and its consequent power, the jury thus prejudiced, aye and perhaps intimidated, I shall lose the cause of my client; whereas if the cause had been heard before an unprejudiced jury, I should have obtained a verdict in his favor. Now, sir, if there is a sanction given to such conduct—if a man with impunity can repudiate the character of my client—if he can say that he is a terrible fellow, a federalist—not only this, but that he is a vagabond—on the eve of bankruptcy, with a number of other things equally bad—what is my situation then? The sheriff is a

popular officer. Although he is independent for three years, yet we know very well that he also may be led astray by passion or prejudice. He may be operated upon in the same way as the jury are. But he may wish to summon a good jury—he may summon men who have never heard a word in their lives relative to the case, but who have read partial statements concerning it in the newspapers. Well sir, suppose the sheriff sends into the box, an upright honest jury; but they have read in the newspapers every thing that can be urged in favor of my antagonist, and every thing injurious to my client—well, my cause is forestated. I have not the opportunity of an impartial hearing. The effect of such practices is strongly marked in the case of John Fries, where the publications were of such a nature as to have the most baleful effect; and in consequence of those publications would have been hung, had not the executive exercised his power of pardon.

In the court we were not allowed to express our arguments on the law. We were denied the full opportunity of defending our clients.

Now I pray the manager to observe that every man accused shall have the benefit of counsel, and that he who attempts to infringe that right, or he who endeavors to repudiate counsel, countervails the right of the citizen:—When, perhaps, his fame, his fortune, his stake in life, his character, wife, children, his family, his all, depend on his having a fair trial.—If he be debarred by those means of this precious right, he may be found guilty and sent to saw stones or to be immured in the solitary cells, under this sentence produced by prejudice.

The freedom of the press is a very necessary appendage of liberty; but, sir, what is the effect if it when employed in the way that I speak of. It may answer the purpose of printers, but not of suitors. The printer may advance his interest by publishing what should be left to a court and jury; but the purity of the administration of justice is destroyed.

When the subject goes into a newspaper it gives to the most skilful penman all the advantages of the cause. He pourtrays the merits of his own cause without any reference to the merits of the cause of his antagonist. But sir, if the business goes into a court of justice, there is to be found the most perfect equality. If either of the parties should be poor, he does not suffer in this case through adversity. He will have counsel assigned to him, and he will have a fair hearing. But, sir, this is not the case if the subject is to be argued through the medium of a newspaper—printers may be hired—a rich man may purchase the services of a press, and, if necessary, writers in his behalf—his opponent, per-

haps, cannot write himself and is poor:—He has no chance of meeting his adversary upon equal ground. This is accommodating the skilful and the rich, to the injury and ruin of the unskilful and the poor. This, sir, is not all the grievance, not the one thousand part of it. We know that in the collision and the warfare of the press, it is to the passions and not to the judgment of mankind that the appeal is made. There is no court to take care that there shall be no passions exerted—there is no check of this kind. Roused, perhaps by the irritations of my antagonist, I begin to think that my cause is one thing and my feelings another. My character is attacked. I cannot submit to the indignity I have received. What is the effect? Instead of obtaining an impartial and unprejudiced decision of the cause, all is passion, and tumult, and confusion, riot, duelling, and murder. Shall it be said that such a course of proceeding is even tolerable? That it could be at all borne with? No, in every state of society the remedy to be applied, is to be adapted to the exigency of the case. You will tell me that the law is a sure remedy. So it is. But it is in vain to tell me that in an apoplexy you must be deliberate and patient; you must have the physician immediately or all is lost. What! when a man has lost his life, to tell him he might procure his remedy by an action at law? But, sir, that is not the only consideration; so far as respects the public rights and interests, the channels of justice are to be preserved pure and untainted, you are not to corrupt the public mind, nor the judicial decisions of the courts. Upon the purity of those depends the safety of our persons, property and reputation. A man carries his cause into a newspaper, at the same time that it is before a court of justice. He will perhaps take care to injure the character of my witnesses. He is replied to. The next day out comes another publication, and this, perhaps, may meet a counter statement. The suit is still going on. Well, a third publication appears, perhaps threatening the personal safety of my witness; and in consequence of which the witness prevaricates. The court will say to the jury, so far as respects the testimony of this man you are to pay no attention to it—Mr. Attorney, this witness has perjured himself, you will take notice of him. Now day after day scenes of this kind may be repeated, and there is to be no remedy for the evil Yes, I may bring an indictment against him; but my cause, perhaps of great importance, is already lost, and I may be ruined. Can the indictment yield me a full remedy for the wrong I have suffered? Can such a system as this, sir, be fit for men of virtue and integrity? Would they have an equal chance with the profligate and unprincipled? No, sir, there is no way but by laying hold of the man, and bringing him before the court for trial, at once. If he acknowledges his error, and says that the case is not as he asserted, and if he makes atonement, then, the court may pardon or mitigate his punishment according to their discretion. It is the right of the suitor

to demand this proceeding, and it is the duty of the court to see that he has full justice. For the sake of society we must immediately bring these people to the public tribunal, and make them answer for their conduct. This is the safeguard of your trial by jury. Then I ask, sir, in the name of heaven what can be the inducement to say, that a man who commits an heinous offence ought not to suffer for it. That his crime should go unpunished? This would undoubtedly be the case, if the arguments of the gentleman should prevail. It is in the system of our nature to apply the remedy to the evil, and there can be no other remedy than the process of attachment, which can effectually restrain a repetition of this encroachment on the due administration of justice. It is not only the expression of the constitution, but the opinion of all expounders of it, that, with respect to the trial by jury, it shall be *as heretofore;* but it shall not be allowed in those cases where another mode of proceeding has been usual.

One word more as to legislative construction and I shall conclude. It is my determination, if the senate concur with me, to conclude this morning.

I wish to turn the attention of this honorable senate to the distinction between a judgment by peers, and a judgment by the law of the land.

By the constitution of 1790, as well as that of 1776, all laws previously in force were made the laws of Pennsylvania; yet, notwithstanding this provision, we find the jurisdiction of the justices of the peace afterwards extended from five to twenty pounds. [*State Laws, vol.* 3. *page* 536.]

"Sect. I. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That, from and after the fifteenth day of June next, the jurisdiction, authority and powers of the justices of the peace of the several counties within this state, which are vested in them severally by an act, entituled "An act for the more "easy and speedy recovery of small debts," passed on the first day of March, one thousand seven hundred and forty-five, shall be, and the same are hereby, extended to actions of debt and other demands, not exceeding twenty pounds, subject to the like relief to insolvent debtors and under every other regulation, restriction and exception, in the same contained, as to costs of suits, and otherwise, as if the said act for the more easy and speedy recovery of small debts was herein re-capitulated and re-enacted, other than the limitation thereof to debts and demands not exceeding five pounds: And if any person or persons shall, after the fifteenth day of June next, bring any suit or action in other manner than

is provided by the act, to which this is a supplement, except as to its limitation, and shall not recover more than twenty pounds in such suit or action, he, she or they shall not have judgment for any costs therein expended, except as in and by the said act is provided."

In this act, not only the sum is enlarged, but the powers multiplied; and I think if they had the right to extend this power of proceeding without a trial by jury, they might as well have extended this act so as to embrace questions for torts and wrongs, and questions of damages between citizen and citizen; because a justice of the peace was supposed to be capable of exercising a jurisdiction, and deciding in cases of debts not exceeding twenty pounds, he was equally capable of exercising the same power in questions of damages; and the constitution appears to have been made a mere *meum tuum*. It is something so repugnant to all my ideas of the constitution, that I cannot but consider the extension to have been intended to commit murder on the constitution, by the adoption of the twenty pound law.

Again, sir, as to the jurisdiction which has been thus extended, not only in actions of debt but even of damages, in a way that did not exist before. By law and by the constitutions of 1776 and 1790, it was provided, that where the parties were agreed they might have the matter in dispute submitted to referees. Why, sir, under this constitution of 1790, the legislature have passed a law, by the provision of which it is in the power of one of the parties to compel the other to go to law by way of reference. Whence have they got this power? Got it? I suppose, they got it by the constitution. Would they look for it any where else? This law does in some cases, allow an appeal from the decision of the justice of the peace, but if the sum does not exceed a particular sum, there is no appeal, and consequently there can be no trial by jury.

Sir, let me relate a case which occurred recently under this law. A very respectable physician, a man of character and of skill, had attended a farmer in the neighborhood of a populous town; he had repeatedly gone to see him, and found his disease to be of such a nature as to require copious bleeding. I believe the doctor was bred in the school of doctor Rush, and, of course, used the lancet with greater freedom and confidence than other physicians usually do. The consequence was, that, although the disease was removed, the patient became debilitated and low in strength, and yet nothing but time was necessary to reinstate and perfectly restore him to health. He was in a full state of convalescence, though being much weakened, he fancied that he was getting worse. Persons little skilled having called, he asked their opinion of his situation. I will tell

you, says one, that the manner the doctor treated you, was highly improper—why he has bled you almost to death—you have lost the stamina of life—you can never recover, unless you are treated in a different manner. This is all very flattering. He takes the advice, and the next time the physician comes, he tells him that he don't want his services any longer. Well, sir, the physician makes out a bill for medicine, advice and attendance, and sends it to the farmer, and charges about twenty dollars. "Oh very well," says the farmer; "I will pay it as soon as I am able to get out."—But the bad advisers again come about him, dissuade him from his purpose, and tell him that his health has been ruined, and that he has suffered a loss of time, and of course the reward of his industry which he was prevented from exercising, in consequence of his being thus purged and bled. The farmer, thus ill advised, made out his bill, and I think laid his damages to nearly one hundred dollars. The doctor was astonished. He was afraid that the strong dosing and bleeding had made him mad. The man had called upon an attorney, and stated his case, but he refused to have any thing to do with it, and told him he was crazy. The suit was brought by the doctor under the coercive authority of the act of assembly—the farmer chose to go into a reference, with which the doctor was obliged to comply. The referees were appointed in the usual manner, and they were actually foolish enough to find against the physician, and in favor of the farmer; in consequence of which the doctor was obliged to pay his patient, instead of his patient paying him. Now, sir, there is but one case that can be compared to this, and that is the court compelling the lawyer to pay his client.

State Laws, vol. 3. *page* 546. [*Act for the suppression of vice and immorality*, giving a single magistrate power to fine persons for profane swearing, breach of the lord's day, drunkenness, &c. and on their refusal or neglect to pay, and sufficient goods or chattels not being found, to commit them to the house of correction.]

Again, sir, in the 6th volume. *State Laws*, [*vol.* 5.] *page* 510.

"That every guardian elected in manner before directed, shall within ten days after his appointment, and before he enters upon the execution of his office, take an oath or affirmation according to law, which the mayor or recorder, or any of the aldermen of the said city, or justice of the peace in the said district or township, is hereby authorised to administer, that he will discharge the office of guardian of the poor truly, faithfully and impartially, to the best of his knowledge and ability; and in case of neglect or refusal to take the necessary oath or

affirmation, for the faithful execution of said office, within the time aforesaid, he shall forfeit and pay the sum of *sixty dollars*, for the use of the poor of the said city, district and township aforesaid." So that if any person refuses or neglects to take on himself the office of a guardian of the poor, he subjects himself to a fine of sixty dollars, without a trial by jury, to be levied by distress or otherwise; and if he does not or cannot pay the fine, he is to be committed to jail. Where is the constitution now? My worthy friends will find they have lost sight of it.

Again, sir, in the 23d section of the same act it is provided, that if any person shall import any mimed or impotent person, infant, lunatic, or any vagabond or vagrant, likely to become chargeable, and does not send him away, he shall be charged with the maintenance of such person, and in case of his refusing so to do, he is to be punished by fine and imprisonment. If a tavern or other housekeeper or inhabitant harbors any such persons, they are liable to fine or imprisoment if they do not notify the guardians of the poor of it. If a pauper intrudes himself on any township to which he does not belong; what is done? Why he is punished by fine and imprisonment. If a father or a husband, deserts his children and his wife, he is liable to fine and imprisonment.

(Through the carelessness of the compositor the following paragraph has been misplaced. It ought to have followed the second break in page 267. But being in itself a complete point in the argument, it is hoped that the error will not be thought important.)

Sir, I will not turn to the general proceedings in Judge Seely's case. I will refer to the reasons of dissent, which have been signed among others by Mr. Whitehill, the honourable Speaker, and by Nathaniel B. Boileau. The second reason of dissent is in these words. "By whatever process, &c," [*See Appendix, page* 93.] I thank my worthy friend for the benefit of his name to this document. Sir, I appeal to the sentiments of the honourable counsel—to the sentiments of the honourable Speaker—to the worthy manager, whether the doctrine for which we contend is not the same as that of the managers? Sir, the same principle was fully understood in the convention, and that all doubt should be removed, amendment and amendment were moved, over and over again until it assumed the permanent shape which it now has.

Now, sir, meaning to touch but slightly on the other points of my argument, I am drawing to a close; leaving much to the ingenuity, talents and application of my colleague.

Here then, sir, I conclude the proposition to be established, that the judges of the supreme court have a constitutional power to punish contempts of this nature by attachment. I apprehend no danger from your decision. I feel confident that no terror, persuasion, party spirit or soothing will operate upon the minds of this honorable court. Whatever may be the result of this impeachment, I do say, that the independence of the judiciary ought to be preserved. It is of far greater importance in a republican than in a monarchical form of government. It would indeed be a lamentable state of things, if with every shifting of party we were to have a shifting of the judges. No man would have fortitude enough, to encounter the risk of feeling and of character attendant on such events. If the popular passions are permitted to operate against the judicial department of the government, the administration of justice will be paralized.

Now whether you think that the judges ought to hold their offices as the sheriffs do, only for three years, or as they held it by the constitution of 1776, for seven years, can have no operation on the question now before you. They now hold their offices by the sacred tenure of the constitution, and unless you have full proof of their having erred intentionally, you cannot find a verdict aginst them on this impeachment. And I ask you in the view of this respectable assembly, whether you have it in testimony before you that such motives swayed the judges? I acknowledge that they are but men, and as such, may frequently err in opinion, but if the error proceeds merely from the imperfection of their judgment, and if you have no proof that they have wilfully violated the constitution, from impure motives, it is not for this court to decide against them. If the judges have given erroneous or even illegal decisions, there is a remedy to be found in an application to the high Court of errors and appeals. If there was a mistaken judgment as to the action between Pettit and Hayard and Thomas Passmore; that judgment could have been reversed by the high court of errors and appeals. If they erred as to the effect of the answers to the interrogatories, their decision might have been referred to the court of errors and appeals; but I repeat, that if they have not wilfully violated or neglected the provisions of the constitution, from impure or interested motives, you cannot possibly decide against them.

I must for a moment advert to some remarks of my worthy friend the manager. I cannot believe that he intended to wound our personal feelings by any thing which he has said, but it appears to me, that he thought himself placed on high ground, and might do as he pleased with us poor lawyers. We have heard him not only say, that all which he expected from

us was mere sophistry and eloquence, but he went so far as to say, that I had no right to animadvert on the witnesses. When I was commenting on the testimony, he called upon the authority of this honorable court, to screen or protect some of the witnesses. From what, sir? From a scrutiny into the motives that actuated them on this occasion. But I am sure he must see that here again he has taken the wrong side of the question. Every man, situated as I am, has a right to animadvert on the testimony, and point out its inconsistencies, and when I refer to the constitution, I find that every man is entitled to the benefit of counsel, and of meeting the witnesses face to face. And is not an attempt to shelter a witness from scrutiny into his motives, an attempt to violate that part of the constitution, which guarantees to either party, the right of meeting the witnesses face to face, and of confuting the testimony of his opponent? But, sir, I will not say too much about Mr. Passmore. I will not say a single word about fraud after fraud, nor will I say a word about many circumstances which have marked the rise and progress of this prosecution.

Sir, in the city of Philadelphia we have a set of merry young gentlemen who tell a tale devoid of foundation and calculated to excite attention or sympathy, with all the apparent concern and sincerity of truth; and this they call *quizzing*. And really I must say that in my opinion Thomas Passmore is the greatest *quiz* we have had since the days of Titus Oates. Sir, he *quizzed* the underwriters when he prevailed on them to subscribe the policy of insurance on the brig Minerva—he *quizzed* Mr. Burd, the prothonotary, when he entered the original agreement—he quizzed his own counsel when he went to the prothonotary's office to enter the rule of court—he *quizzed* the referees when he furnished them partially with the papers and with mutilated records—he quizzed the referees when he palmed upon them his exparte affidavit of what Mr. Phillips, the carpenter, and of what the pilot had said—he *quizzed* Mr. Sampson Levy in all his subsequent transactions, and he *quizzed* poor Mr. Brown when he called to ask his advice whether it was a contempt or not, and never told him that the matter was still pending in court.—And now when the report of the referees was made, he commenced a profitable course of *quizzing*. The completest *quiz* of all, was the one which he practised on the insurance brokers. I say no man seems ever to have had a happier method of *quizzing* than this same Thomas Passmore. Well, sir, after *quizzing* Mr. Shoemaker, to draw an order, he goes to Mr. Lyle and he *quizzes* him out of his signature to the order;—he then *quizzes* Phillips, Cramond and co. and Nicklin and Griffith out of their money. This is all *quizzing* very well; it is *quizzing* to a very good purpose—to the amount of about three thousand dollars. He

attempts to *quiz* Mr. Bayard, but here his proficiency in the act of *quizzing* fails him. In short he *quizzes* lawyers, underwriters, brokers,—every body. At the prothonotary's office, he *quizzed* his own conscience, with respect to the judgment of the 6th of August. Here he quizzed his conscience, for he swore that he believed the suit at an end by that judgment, although he had afterwards entered another from a conviction of the invalidity of the first. Here, sir, Mr. Passmore *quizzes* his conscience. He attempts to *quiz* the prothonotary, but is told that there is a variance between the original agreement and the rule of court, which originated with the clerk. He goes to Mr. Brown, who goes with him to the office, and after a threat by way of *quiz*, he obtains an execution. Well, sir, after getting this execution by the art of *quizzing* he thinks himself perfectly secure. But now, sir, the *quiz* became of a very serious nature, and without going into the particular items I must say that this Mr. Passmore is a very saucy, naughty *quiz*. Does he not *quiz* his conscience when he swears that Mr. Levy took him by the arm and asked him to take a walk? Does he not again *quiz* his conscience when he swears that, according to the best of his judgment and belief, there was no action pending on the 6th of August, when so late as the 26th of October he styled it an action? Sir, I ask the honorable Senate to pass in review this system of *quizzing* and to pronounce what decree of credit ought to be given to the testimony of such a *quiz* as Thomas Passmore. But he seems to have his followers in the act of *quizzing*.

Lawyer Henry also turns *quiz*, and my clients seemed to have been the subjects of his *quizzing*.

My worthy friend the manager, has committed a *quiz*, in which he has said, that the character of the witnesses ought to be protected from scrutiny, and are my notes correct, sir, when I find the manager declaring that the principal charges contained in the contempt, so far from being libellous, were true? As to Mr. Bayard, I know he will discover that his relations in life —his industrious integrity—his fame—his family—his character have all experienced by that publication, an injury which can scarcely be atoned for, although he may in a great measure destroy its effect. But the adoption of the sentiments of that libel, by so worthy a character as the honorable member, gives them additional force; they may revive at some future day, and not only destroy the happiness of his own life, but even embitter that of his innocent offspring. Sir, is it possible that my worthy friend the manager, wishes to adopt the sentiments of that libel, and say that Mr. Bayard is a perjured man, a liar, a scoundrel and a rascal; for these are the subjects on which the paper goes, to ruin the character of Mr. Bayard. And shall it be said, that Thomas Passmore is an object to be sheltered

from scrutiny? He who at every turn has slandered the purest characters, and who has heaped insult upon injury by the foulest aspersions. Not only Mr. Bayard has felt the force of his malignity, but every man who does not yield an implicit obedience to his wishes, is sure to incur his hatred. The elder Mr. Levy has been branded with a charge of corruption, because he had honesty enough to give Passmore his real opinion. Mr. Bayard it is well known has been expressly charged with perjury. What was the meaning of the question put by the manager to Mr. Brown, and with whom did it originate? From its obvious meaning Mr. Brown is supposed to be terrified; it is insinuated that he was prevented by his apprehensions of incurring the displeasure of the Judges, from giving his candid testimony. Mr. Passmore must have stated this to be the case. But, sir, this worthy young gentleman, on his solemn oath, and with an additional appeal to heaven, has declared what Passmore has said to be false. Passmore has been pleased to say that his lawyer was corrupt—that he had taken a fee on both sides. Let me state that fact. Sir, let me observe that it not unfrequently happens that we are called upon for advice and opinion by both parties to a suit, without either of the parties knowing that his opponent has applied to the same attorney for similar purposes; for *advice and opinion* are one thing, and *argument* another. They frequently state the case hypothetically, as a case between A. B. and C. D. and leave us unacquainted with the real names of the parties. Nay sometimes state all the general facts for opinion; and if they choose to commence a suit after it, the opinion given does not bind us to plead in the action. We have frequently given in opinions on both sides; there is therefore no inconsistency apparent. Again, sir, if the party chuses to commence his suit, he goes to another lawyer for the purpose of instituting it. In that case, though he has my abstract opinion, he is not entitled to my future assistance. My learned colleague was applied to in this way before the amicable action was instituted; he gave his opinion and never heard further of it until he was told that an award had been made in favor of Passmore. Why, sir, the case was now very different from what it was when his opinion had been asked by Passmore, because the exceptions to a report of referees are always widely different from the original cause of action. It is in fact in the nature of a new action. When, therefore, Mr. Bayard applied to him, it was so much a matter of course, that he could not have considered himself as retained. Even if the circumstance of being applied to by Passmore had not escaped his memory, it would not have been improper in him to become the advocate of Mr. Bayard. But, sir, no sooner did Passmore express a wish to delay Mr. Bayard, by saying that he had retained him, than Mr. Ingersoll returned Passmore his fee and with-

Mr. Bayard;—that he had consulted counsel, not a clerk, but a real attorney, who had told him that the publication would be no contempt. He knew very well when he said this, that Mr. Brown had qualified his opinion by saying "if the judgment is final there will be no contempt," and at the very same moment he knew that the judgment was not final nor the action ended.

Sir, it never will be contended that this judgment could be thought good, or that it could operate against the parties agreeably to the terms of the award. There is a case in 1*st vol. Reports of Cases adjudged in the Supreme Court of Pennsylvania, page* 293, where the report of the referees was set aside merely because the clerk had made out the rule of reference different from the agreement of the parties. [*See Appendix, note* I. 3. *page* 73.]

This was decided in 1788. Permit me to ask was this case depending in Court? One is almost tempted to smile at the question. The Court considered it so, as they did in the case of Passmore, and they acted upon it accordingly. The Court is to be governed by a uniform rule of conduct. There must be no cutting and splicing; the ligature must be kept entire—cut it once and you can never mend it. The rules of law are perfectly consistent. The action originally in the name of Thomas Passmore against Pettit and Bayard is still depending and probably will be decided in March next.

And now, sir, we shall find that this *quizzing* to nearly the amount of three thousand dollars, was on account of a rotten plank, not fit to carry rats to sea on. In all insurances on vessels, it is an implied contract on the part of the owner, that the vessel shall be sea-worthy at the time of her sailing, and completely provisioned and manned,—lawyer Henry to the contrary notwithstanding. If the fact is otherwise, and the defect is not even known to him, or is known to him and not to the underwriters—that is, that the vessel was not sea-worthy—the indemnity can never be recovered, and the underwriters shall be discharged from their obligation. Lawyer Henry thinks differently, but I think that I am the more correct lawyer of the two. If however he has decided upon correct and pure motives, we have no right to censure him. Sir, this was not a question upon which Tom O'Nokes and Peter Stiles, and people who know nothing about such things, were competent to decide.

Was Thomas Passmores's contempt purged by his answers to the interrogatories? This is a question that requires your

most serious attention. That he published the contempt is acknowledged by himself. This being established, you are to consider that the interrogatories require answers to the facts, answers that are full and direct, and not according to mere judgment and belief. Whether Passmore did this act without knowing it to be a contempt or not is a matter of no consequence. A man's declaration that he did not intend to do an illegal act which he has committed, is farcical. If a man is charged with murder, it will not avail him to say that he meant merely to beat and not to kill. If a man shall commit a larceny and say that he merely did it by way of *quiz*, that he only meant to borrow, will this be sustained as an acquittal.

I will refer with confidence to the case of Shebbeare; and I feel confident that the honorable counsel will concur with me in opinion, that the purgation of the offence is the same in substance and form, whether it is committed by an officer of the Court or not; or whether it is committed in or out of the view of the Court. It is all the same, sir, if it has an effect upon the fair administration of justice.

MR. HART. (a Senator) I think it better to adjourn.

MR. DALLAS. I have but a few words to say.

MR. HESTON. I think it be better not to adjourn. Let us hear the gentleman out.

MR. DALLAS. Ignorance, sir, upon this subject is no excuse; and it is remarkable that Passmore so far from declaring his innocence, swears to his guilt, reiterates the offence, and strives to rivet it upon the minds of the Court and the public. I do not know that it is possible, in a case of this kind, to urge ignorance as an excuse or palliation, when he persists in his crime even before the Court. But if the Judges have erred, it is an error of judgment and they ought not to be impeached for it.

Then, sir, let us look at the exercise of this power, under all the circumstances of the case, and we shall find that it was mild, liberal and lawful. Where do we find an exception? Take the words of the Court and the manner in which they were delivered, and you cannot hesitate to declare in their favor. For my own part I know there was an anxiety on the part of the Court to ameliorate, if not do away, his punishment. They were in hopes that he would do something to authorize a contrary decision from that which he compelled them to adopt. But I beg the honorable Senate to recollect, that the Court are under an obligation to deliver to every sui-

for impartial justice, and to declare he is entitled to his remedy for the injury sustained—How do they act? They admonish him; they point out to him the only method by which he can escape punishment; but in consequence of his obstinacy they are compelled to pass sentence on him. Even after this, was he not treated with an unusual degree of clemency, when he was permitted to go to the debtors apartment instead of the common jail? Was he not, by the indulgence of the Court, permitted to visit his family without the attendance of an officer? It has been hinted that the degree of punishment was severe. Sir, it was such as the Court could not avoid. They had before them the cases of Duane and Oswald who were both imprisoned for thirty days. With respect to the fine of fifty dollars, it is a mere nothing; and if the Senate were to take into view the amount of fines directed by the Courts of justice, they would be harrassed every session with impeachments. As to the fine of fifty dollars it could not be considered enormous or improper. There was not at that time a single word or intimation given of his circumstances being in the involved state in which they were; and his apparent circumstances were good indeed. The situation in which he lived very easily begot an idea of his competence, if not of opulence. He had a large house, lived well, and it was supposed that he sold a good deal of ware.

Now, sir, I have nearly done. I conclude by declaring, that in all the circumstances of the case, the Judges have exercised justice with mercy—their conduct was mild and admonitory—they have done no more than what their duty imperiously commanded them to do; and God forbid, that, for this, they should suffer a punishment in your verdict. If the exercise of this power ought to be restrained by the Legislature, they have the authority under the constitution to restrain it by law; but do not impeach the Judges for doing what the constitution authorizes them to do. Your constitution declares, that you shall pass no *ex post facto law*. That principle will operate on your determination upon the present case. You will not inflict punishment for that which has not yet, by the law or the constitution, been declared or marked out as an offence. I beg the honorable House of Representatives to refer to the title and contents of the bill for punishing contempts; let them look at the language and see how it corresponds with the acknowledgment of this power in the Judges. Let us go further. When the application was first made for this impeachment, there was a very great diversity of opinion in the House of Representatives, and the committee of grievances were, I believe, equally divided. The mere casualty of the death of a relation, happening to call away one of the members, gave to the friends of impeachment an op-

portunity of making the report they did. If this had not occurred there would have been a tie (the principle having been tried before in the committee) and the report would have been lost for want of a majority.

The bill entitled an act concerning contempts, declares, that " Whereas the present state of the law respecting contempts of Court is liable to much uncertainty, perversion, and abuse, and militates strongly against the constitutional provision of the trial by jury."

They then go on and declare the particular cases to which the power of inflicting summary punishment for contempts shall be restricted.

If then, sir, you have the power to alter the law on this subject, employ that power and your fellow-citizens will yield obedience.

Sir, you will find no men more prompt to do this than the honorable gentlemen at your bar. But if it be your opinion that they have erred in the present case, if you think that they have misconstrued the high powers confided to them, I beg you to consider that they are not criminally responsible for a mere error in judgment. For the sake of yourselves, for the sake of your constituents, for the sake of the United States, for the sake of the world, to whom it will be an example, I implore you to award impartial justice, and to decide by an acquittal.

NOTE.

The printing of this work has been divided. This has occasioned the absence of five numbers in the paging; (from folio 287 to 293) but otherwise the work is not the less perfect.

SATURDAY, January 19, 1805.

Mr. BOILEAU.

Mr. Speaker, and
Gentlemen of the Senate,

ONCE more permit me to address you on this all-important question. When I first addressed you, I rose with embarrassment; and now, since the storm of eloquence that has been poured upon you and myself, that embarrassment has been still more encreased. The ruins that the gentlemen, of counsel for the respondent, has said are falling about our ears, I conceive to be but the castles built in the air, by that worthy gentleman, and not the strong towers which we have built. The single, solitary word "sophistry," which dropped from me, has drawn from the gentleman a volume of declamation and eloquence. Sir, it was not my intention to say a word against legal characters; there are many worthy and honorable characters among the profession; but there are some who do not deserve the appellation.—The gentleman has alluded to a Randolph, a Nicholson, a Giles, and a Rodney—yes, sir, a Rodney! this worthy gentleman to whom we applied—the name of Rodney will be dear to every Pennsylvanian—a name dear to every American, as long as liberty shall exist. The worthy gentleman has been pleased to advert very frequently to the word "sophistry;" whether you have heard any thing like sophistry, it rests with you to decide. But that you have had much ingenuity, admits of no dispute.—You need only mark the first expression. Knowing the name of Jefferson to be dear to the people of this State and the honorable Court, he has placed him in the fore-part of the battle. Sir, he tells you Mr. Jefferson is a lawyer—you place confidence in Mr. Jefferson, and Jefferson is a lawyer; and I am a lawyer, therefore you must place the same confidence in me that you repose in him. I will not say that this is "*sophistry*," but I will say that it is not sound reasoning. But, sir, I deny the proposition that Mr. Jefferson is a lawyer. He may have studied law as a science, and I believe did practice for a short time. But what did he say?—did he not say, that the pursuit of the practice for any length of time was hazarding a man's moral honesty. That the habit of advocating causes indiscriminately, had an almost irresistable tendency to destroy that accurate discrimination, and nice sensibility of moral rectitude, which are the most beautiful and substantial ornaments of reason and of human nature. I have this from very good authority. I never arraigned those gentlemen, the counsel for the respondents; then why has sophistry been rung in ten thousand changes during this argument? The adverse counsel have set an example by reading from books not admitted as authority, and have permitted us

to read any authorities. I will read an extract, from Godwin's Political Justice—[2 vol. 294.] Sir, I do not give this as my opinion, but I read authorities as good as his; and his authorities are of as little weight.

The gentleman has vauntingly referred to Congress, and asked, who are Randolph, Giles, Nicholson, and what is their conduct in this respect? Are they not opposing the arbitrary and oppressive conduct of a Judge of the Supreme Court of the United States? And in Congress is a Rodney. Yes, sir, here is a Rodney, in whom we confide on this all-important occasion. The gentleman has called your attention to Jefferson's Notes.—He has spoken with a kind of sneer at the farmers. Let us see what Mr. Jefferson has said of the farmers. He will not question Mr. Jefferson's authority. I presume he will not.

"Those who labor on the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth.—Corruption of morals in the mass of cultivators is a phænomenon of which no age nor nation has furnished an example. It is the mark set on those, who not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsistance, depend for it on the casualties and caprice of customers."

They look up to Heaven! Where, sir, do *those* gentlemen look to? Are the steps of the Church worn with their tread? is the High Court importuned by their petitions? or, do they look to, and live on, the vices of mankind, and fatten on the spoils of human nature? Sir, my learned friend charges me with having mounted upon stilts; he, also, in his turn, seems to have gotten upon his stilts, and forgotten that the weather was slippery, or he would not have eulogized the lawyer at the expence of the farmer. Let us blow away that chaff, sir, which obtrudes the vision, and we shall see clearly to pursue the path of truth and justice.

I said, sir, when I set out on this business, that every kind of prejudice should be left out of view by this honorable Court. Did not my worthy friend tell you, that the newspapers teemed with paragraphs, on the subject of this Impeachment, by which the eyes and ears of the Judges were assailed. But mark, sir, whether publications, calculated to affect the regular decision of this important question, have not made their appearance from another quarter. Here, sir, immediately after Mr. Passmore applied to the House of Representatives for

a redress of his injury, and an inquiry into the conduct of the Judges of the Supreme Court, we find the following in Poulson's paper of the sixth of March, one thousand eight hundred and three.

[We could not procure a copy of the extract here read by Mr. Boileau, in time for this page. We shall endeavor to procure and insert it in some part of the Appendix.]

Sir, I will not read all this, because I deem it unnecessary. But whose signatures do we find attached to it? Thomas Ross, Joseph Hopkinson, Moses Levy, and William Lewis. Sir, did not these gentlemen know there was a cause then pending before the House of Representatives, which might be brought before this honorable Court? But, sir, the learned counsel will tell us that we do not understand law. That we do not know the Constitution of our country. We are not to pay attention to Thomas Passmore,—not to a mere mender of tin kettles and tin welding, but to men of legal knowledge, whose opinions are to have weight, while those of Mr. Passmore are not attended to. Here we find another of Mr. Lewis's publications, which will shew that these gentlemen are not above contempt. And, sir, at what time this was published, and what was its object? Was it written for your information, or in contempt of your authority, and understanding? Here, sir, we find in a paper printed in this town, a piece extracted from the Gazette of the United States.

"We understand, that our sapient Legislature, at Lancaster, after having determined to prosecute the Impeachment of the Judges of the Supreme Court, find themselves brought up by an insurmountable deficiency of talents, that they cannot conduct the business themselves, and their cause and credit are so bad, that they cannot obtain assistance. Mr. Levy, Mr. Tilghman, Mr. Rawle, Mr. W. Tilghman, and the Attorney General, have severally been applied to, and all refused; each giving as a reason for their refusal, that, in their opinion, the conduct of the Judges had been perfectly legal and correct; and some of them have gone farther, and declared, that their decision in the cause was marked with great mildness and forbearance."

Now I do not charge this upon the Judges, nor to the lawyers;—but the language used in this paragraph, is the very language employed by some of the gentlemen of the bar, in their answer to our application for aid in the present prosecution; we do not charge these gentlemen with being the writers of this paragraph, but it shews that they spoke very freely of the subject.

As to the application made to the bar of Philadelphia, for professional assistance, on the part of the prosecution, we are perfectly satisfied with the conduct of the Attorney-General. He gave us a satisfactory answer. We were also satisfied, that others not only refused their professional aid to the committee of managers, but expressed opinions which I will not now repeat. Sir, this looks very much like a contempt, but we do not let such things prejudice our minds, nor rankle in our hearts. No, sir, we view in it as nothing but the black vomit of an expiring faction, and a set of harpies sickening at the thought of the liberties of the people being rescued from their talons.

Sir, here is a book in which we find the Legislature of Pennsylvania very grossly libelled. It is entitled "Trial by Jury," and supposed to be written by some lawyer or gentleman who is connected with the law. The author is probably now within hearing. This was written in 1803, and the case of the Judges was then pending.

"The fabricators of the Adjustment-bill, in our last Assembly, were not satisfied with attempting to violate the Constitution, in endeavoring to destroy the trial by jury: but, as if to serve as a *memorial* of their pitiful malevolence against all who *understand* the laws of their country; they interdicted the pleading by "HIRE," as they term it, before the new-fangled, but *most enlightened judicatories*, which they were about to erect."

"They should, however, have known, in the profundity of their *wisdom*, that the *fee*, which is paid for *Counsel* in a cause, is *gratuitous*: No specific sum—not one cent—can be *demanded* by a *Counsellor at law*, in *that* capacity; nor can be recovered by process of law, if not voluntarily paid, for any services rendered by him, in the way of his profession. The party, if he desires to have *counsel* in law, goes to whom he pleases, for advice: he gives for it such compensation as he thinks proper; and it will hardly be denied, that he has *the right of disposing of his own money*, as *he* pleases.—The fees of *Attornies* are established by law. They are such as *Legislators*, quite as enlightened as those who composed the major part of our *last* legislative body, deemed a *just remuneration* for the services for which they are assigned.—*Counsellors* of law are, however, bound to give counsel and help the poor, *gratis*—in such cases wherein they are not able to prosecute law at their own charges; and this they do *informa pauperis*, by direction of the Judges."

o "It is not a little extraordinary, that those wonderful *economists*, who are so extremely fearful lest their *constituents* should expend their money improperly, by paying it to *lawyers*, &c.

should not have been so consistent as to give up *their own* WAGES! But, no such thing—they knew better:—They had not the least objection to sit *four months*—most unnecessarily; and to receive from the purses of the people threee dollars *per day*, while most of them were living (and that at a season, too, when they could do little or nothing in their ordinary occupations,) at as many dollars *per week*."

"The late session of Assembly continued four months; at an expence to the State of not less, it is presumed, than *sixty-seven thousand dollars*. In this long period, 94 acts were passed;—85 under the denomination of laws—and the others resolutions. Of these 85 laws, 14 are private acts—20 are acts respecting election-districts, wing and mill-dams, and the institution of lotteries—and the remainder comprises 51 acts, all of a local and special nature: And, of these last 51 laws, not more than 10 or 15, at the utmost, are of much importance to the State at large. In the whole number enacted, we perceive very few, indeed, of great and immediate concern to the citizens of Pennsylvania, generally: Yet we readily discern many of very little moment to the community; and one if not two, of an unconstitutional complexion. But what measures were adopted, for improving the natural and political condition of the State, on a great and extensive scale—for cultivating the resources of public wealth and general prosperity, which we possess—and for applying *rational* and *constitutional* remedies to evils which actually exist; without resorting to *political empyricism*, for the cure of *imaginary* ones?"

"Such, however, have been the labours of a four months session of the General Assembly of Pennsylvania, of 1802-3!"

"It is asserted, that one of the Adjustment-bill men, in the last session of Assembly, was heard to say—"The common law is a very bad law: it is high time to *repeal* it, and enact a *new one*."—What disgraceful ignorance in a Legislator! How could this man be said to *represent* any portion of the *American people?*"

Thus you see the odium attempted to be thrown upon the Legislature. But I suppose the gentlemen will say, that this is all fair and upright; the Legislature is fair game and may be vilified with impunity.

Here is another book, written also by one of the profession, in 1804. Sir, this very pamphlet was considered of such importance, that it was sent to me by post, and it was also sent to the members of the Senate, since the commencement of the present session. Here, sir, we find, in page 14, (*Strictures*

on the proceedings of the Legislature of Pennsylvania, &c.) the following language:

"Ye justices of the peace! you are called upon by the *violators* of our Constitution, to execute the *fruits* of their *violations!* You are called upon by that spurious *offspring* of the rankest and vilest corruption, to pollute your hands by being the *panders* of that foul offspring, and to be the *aiders* and *abettors* of that corruption! Remember, I beseech you, the solemn appeal you made to heaven, to bear witness to the *faith* and *allegiance* with which you promised you would support the Constitution of Pennsylvania. If the guardians of that sacred instrument, that solemn league and covenant, that grand charter whose characters were written with the blood of our slaughtered citizens, have been unfaithful, and have manifestly abused it, it does not follow that you are to be unfaithful and abuse it also; *you, like the venerable, and enlightened and patriotic governor of Pennsylvania, should wash your hands from so impious a transaction; if you have any respect for your oaths, your consciences, your moral or religious characters, your lives, your families, your estates, your Constitution, and your country,* you will not be accessary in violating that most important pillar of a free government, that heaven-born institution, "trial by jury," which the declaration of rights—rights placed beyond the reach of the Legislature, says "shall be as heretofore, and the right thereof remain inviolate."

Here, sir, the author represents justices of the peace as called upon by the Legislature to pollute their hands with corruption, and to infringe the Constitution. Again, on the very subject which is now before you, hear what is said in the same pamphlet, pages 18 and 20.

"I have, I think, proved almost to demonstration, that the committee and the House appear to have been actuated by foul and impure motives, in rejecting the natural and irresistable inference arising from the evidence of *Mr. Brackenridge's* letter, to wit: That if Messieurs *Shippen, Yeates* and *Smith*, did commit an error in judgment in *their* sentence passed on *Thomas Passmore*, and thereby subjected themselves, in the opinion of the House, to *Impeachment* for a high misdemeanor *in office*, then he, Mr. B. did also *commit* an error in Judgment, in the sentence passed on *Thomas Passmore*; since it is in proof, as strong as holy writ, that he (Mr. B.) was on the bench at the time sentence was passed and concurred with the other Judges in the same."

"The fact of *corrupt influence* on the part of the people's Representatives in the General Assembly, being thus beyond

all dispute incontrovertibly established, let us (before we enter on the point proposed) first inquire a little into the nature and measure of *guilt*, which this fact contracts when viewed through a constitutional medium. In turning to the 8th Article of the Constitution of this State, we find it is thus written: "Members of the General Assembly and all officers Executive and Judicial, *shall* be bound by *oath or affirmation* to *support* the *Constitution* of this *Commonwealth* and to perform the *duties* of their respective offices with *fidelity*."

"Thus then this *immaculate*—very *honorable* and *impartial* body having waved the only alledged grounds on which they could consistently with themselves and the Constitution *impeach*,—it follows, that the House cannot make them the foundation of, or take them at all into view on an address to the Governor for removal."

Thus are the Representatives of the people charged with *impure motives*, and *corrupt influence*; and this too, on an all-important question which is still pending.

We approach still nearer to the subject,—to the very persons engaged in this prosecution. Reference has been made to Mr. Brackenridge's letter. Sir, let us see what he, who is presumed to know the law, says, after the House of Representatives have preferred an Article of Impeachment against the Judges.

"I have seen a report of the honourable the House of Representatives, on the complaint of Thomas Passmore, against all the Judges of the Supreme Court of this State, myself excepted, for a judgment on an attachment against the said Passmore, on an alledged contempt of the administration of justice; and which report your honorable House has adopted, and proceeded to act upon. I was not upon the bench when the motion was made for a rule to shew cause in the case why an attachment should not issue, the motion having been made on the last day of the September term, 1802, when I had left the city on account of the yellow fever which had begun to prevail, and the motion having been heard before the Judges residing in the city or near it, and who met on that day for the purpose of hearing motions only; nor was I on the bench when the arguments on the facts of the attachment was made absolute, having returned from a special Court at the county of Northumberland by way of Carlisle, the place of my residence, and but a few days intervening, so that I did not take my place on the bench until some days after the begining of the term, but I was present on the third and last hearing of the case when some additional evidence was given and observations made; the presumption may have been, that I did not

take a part, and doubtless I might reasonably have excused myself; but I cannot say that I did not take a part, I gave the case all the consideration I could at the time, and three-fourths of the Court who had heard all, declaring themselves fully satisfied, I saw no reason to warrant a dissent, but concurred."

Three-fourths declared themselves satisfied, therefore he, depending upon the opinion of his brethren, concurred. I suppose, sir, that this is a common law doctrine.

"I cannot therefore distinguish my case in law from that of the other Judges, and in honor I would not; I am far from avoiding or courting a prosecution, but am unwilling to incur the imputation of screening myself when in strictness equally liable, but I think it absolutely necessary for the credit of the republican administration that I should not be distinguished, as there can be no stronger evidence than a man's own acknowledgment,—the House will find no difficulty in a resolution to add my name to the list of impeached officers."

Now, sir, here is a direct insinuation against the purity of our motives—that we have been influenced by party spirit. He tells us, that for the *credit* of our republican administration, he ought not to be distinguished. Sir, is that the language which a Judge of the Supreme Court is to use to the House of Representatives? Is he to tell us, that he is the guardian of their honor?

Some of the witnesses, sir, thought that Mr. Brackenridge was on the bench, when sentence was passed on Pickering; others said that he was not, and some could not recollect. The matter is still doubtful. But what was his object in writing that letter? Does he undertake this trick to rescue the Judges, and did he think by embarking on board this big Minerva, to carry them all clear into port? Now, sir, what shall we call Mr. Brackenridge? He is one of that sort of Judges which are not recognised by our Constitution. What is the tenure upon which he holds his commission? The spirit of the Constitution provides, that the Judges shall be independent, and that they shall hold their offices during good behaviour. But this Judge is not independent. He is dependent on the will of the Executive Magistrate. Where do we find such a character, such a monster? I suppose in the common law. We may, perhaps, find a description in some of those volumes that lie on the floor.

I would not be improper to recommend him to many things that may but the feelings of the gentlemen assigned as grand jurors, we could

have procured more counsel, I should not have been placed in this disagreeable situation. Here, sir, is a letter signed Edward Shippen, Jasper Yeates and Thomas Smith, and addressed to the House of Representatives.

"That your memorialists, immediately on being informed of your honorable House having adopted a report of the committee, on the complaint of Thomas Passmore, addressed to you a memorial, soliciting a prompt and speedy trial of the adopted charge, that equal and impartial justice might be done, as well to the citizens of the Commonwealth, as themselves."

"They now beg leave to represent, that they are pained by the reflection, that they are not yet furnished with the opportunity of defending themselves: They find themselves subjected to obloquy by the artful representations of *an offender against the laws*, founded on mutilated and imperfect records, and groundless insinuations, and earnestly desire to have it in their power to remove that cloud with which they have been industriously enveloped."

Sir, what is the meaning of this? What does it carry on the face of it? That the House of Representatives have acted upon the testimony of an offender against the laws, founded on mutilated and *imperfect* records, and *groundless* insinuations. Would the Judges have allowed such a memorial to be presented to them, without punishing it as a contempt? Sir, Passmore was fined fifty dollars and imprisoned thirty days for a less contempt than this—for insulting Mr. Bayard. But, sir, what would these gentlemen say, if a bill had been brought before a Grand Jury, and a letter had been addressed to them, by a party against whom it was preferred, in a stile similar to that I have just read, after the Jury had found a true bill? Would not the Court have been very willing to issue an attachment? But, sir, we don't wish to pursue measures of this kind.

Now, sir, we have got very near to the counsel list. Did not the counsel insinuate that we had been dictated to by Passmore, whom they would represent as a lying, angry individual, for whose intellects they were apprehensive? When he was about pleading and expostulating with the Judges to be less rigorous towards him.

Would it not be more proper to recommend him to the Hospital? Would it not be more humane to send him there than to that noble apartment allotted to Mr. Duane?

Every attempt, sir, almost, has been made to criminate this poor man. It has even been very industriously reported that he has been guilty of perjury. We find, sir, that in the indictment——

Mr. Dallas. It must be known, sir, that my learned colleague, and myself, are not disposed to throw any obstacles in the way of the evidence on the part of the prosecution, and we have agreed to yield in every possible situation. But an attempt is now made, which, if it is recognized, will prostrate every rule of evidence, and we should be doing injustice to our clients to admit it. The object is to introduce the record of the District Court of the United States. I know, sir, that there is lurking in the mind of that man, a desire to attribute this prosecution, for perjury, to the Judges. But of what object is it to this Senate, to ascertain, that Thomas Passmore has been indicted for perjury, and has been acquitted upon a defect in point of law? This honorable Senate will recollect, that, in the whole course of the proceedings, I have eluded every thing on the subject of Passmore's character, but what appeared immediately connected with the subject before them. I did not think this a proper question to introduce, because, though the aquittal was upon a point of law not connected immediately with the merits of the case, I can't say, I dare not insinuate, that Thomas Passmore was guilty of perjury. Although I did my duty as the officer of the United States, in bringing forward that action, yet I was partly compelled to it. It was in no shape connected with the present business, nor dictated by any attendant circumstance. But the honorable House are to determine by what ingenuity, logic, sophistry, or eloquence this is to be visited upon the Judges. If obloquy is to attach any where for bringing this suit, it should be on me, sir, and not on those gentlemen. The action was brought in the District Court of the United States and the prosecution was extinguished on a question of law, and of law only.

Mr. Boilleau. The gentleman don't object to our reading the paper in argument; we do not present it as legal evidence.

Mr. Dallas. I object to its being used at all. In this business I may have exposed myself as a fallible man, but sir, if in this measure I have been guilty of any design to repudiate the charge of public delinquency against others, or of any design but that of official duty, I stand in the predicament of a public offender. If, therefore, there be any blot, let it be imputed to him who made it. I declare to you, sir, and to my country, that I discharged my duty without any improper views to Passmore. At the time that the charge, involv-

ing perjury was brought against him, I was not then the counsel of the Judges. Sir, give me leave to state, that, though by the medium of the press, I was first called upon to do my duty, as Attorney of the District. The first information was received through the public prints, in a publication signed *Amicus*. I wrote an answer, and in that answer requested the person who possessed such information to call upon me. I received no answer. But I afterwards received a letter, and I found that similar letters had been sent to others, and even to the Judges. But never till the trial, did the Judges know that any step had been taken in the business. Although they each of them received a letter, not one of them ever took any notice of it—not a single observation fell from their lips on the subject. Mr. Levy had been charged with corruption. But Mr. Levy also was informed of this, and he gave me notice that he would have nothing to do with it. What was I to do? I was publicly charged with an inattention to my duty. I might enter into the press in support of my official conduct; but I thought it unnecessary. One morning, however, I saw a man at my house, who appeared very much injured, and was considerably agitated. On his entering the room, he began a conversation on the very business. I said, I then, sir, I suppose you are the person who used the signature of *Levinson*." After some hesitation, he admitted that he was the person. I asked his name, and the result was, that he was the partner of the worthy member of the Senate. He went into a full detail, and such was the nature of the information, that I thought it my indispensible duty to enter a prosecution, and that I could not in honor, avoid it. Such, however, were my impressions, that I postponed it until Judge Washington arrived in the city that I might consult him on the business. I do declare, on my most solemn word of honor, that I never received, either directly or indirectly, any intimation from the Judges of the Supreme Court, to proceed as I did; and I do believe they would have given a large portion of their fortunes had not this prosecution, for perjury, against Passmore been instituted; but the charge was a violation of his oath upon the act of bankruptcy, I could not possibly act in any other manner than I did. Upon the arrival of the Judge, I laid the case before him; he took time to examine it, and was struck with the weight of the proof of the charge. How much better would it have been for Passmore to reflect and say, "I am not yet free from a charge of this description, and although I feel myself bare by the decision of the Judges, yet I will abandon the prosecution I have solicited." Some doubts were entertained as to the sufficiency of the bankrupt law to punish the offence, and it was therefore a subject proper for the Judges to decide. Well, sir, on this the warrant issued; but, we were obliged to proceed under the act of Congress, for, at

cording to the principles of common law, there shall be two witnesses to the fact, to substantiate the charge; and we had only one to support this. The bill was laid before the Grand Jury, and a more reputable Grand Jury never was convened; they almost unanimously returned it a true bill. I believe one of the members of this honorable Court was on that Grand Jury, and one of the worthy managers was a Petit Juror on that occasion. When the business came to be tried, and on that occasion, Mr. Passmore was assisted with very able counsel; the law on which the indictment was brought, was argued, and the Court decided, that, according to their opinion, the provisions of the law did not extend to offences of this nature; in consequence of which, without saying one single word on the merits of the case, they told the Jury, they could not convict, but must acquit the defendant, because there was no law to punish him.

Mr. Boileau. I did not mean to impute any improper motives to the learned counsel; I stated, that it has been said, that Mr. Passmore had been convicted of perjury. A report of this kind is unquestionably in circulation in this town; nay, I had heard it more than once myself, and I considered it a duty I owed to this Court to endeavor to remove the impression. I do not stand hear as the advocate of Thomas Passmore, but as the advocate of the Constitution of my country. But there is one duty now which I owe to myself. My learned friend, the counsel for the respondents, has charged me with quizzing. This may be a law term, for I can find nothing of it in any dictionary. He has charged me with saying, that it appeared in evidence, that Mr. Bayard was guilty of the charges alledged in the paper written by Passmore. If I did express such a sentiment, it was not my intention to convey an idea derogatory to Mr. Bayard's character. I said, or meant to say, that we could bring evidence to prove every fact charged in the Article of Impeachment to be true, and not in the alledged libel. He has charged me with injuring the character of Mr. Bayard. I deny the assertion; I never wished to injure the character of any man concerned in this prosecution. However, if I fail in establishing the facts, contained in the Impeachment, which I hope I shall not, I shall have the consolation of reflecting, that I have not failed through want of truth to support me. But the fact seems to be this, that gentlemen of the bar may say what they please; that they appear to be a kind of privileged order; but, if we say any thing, we are told, we are all wrong—we know nothing of law, or the Constitution. I do not wish to say any thing against the character of Mr. Bayard; but am I to be charged with quizzing, if I say he did not take the proper method of obtaining redress? Was it generous to say, to insinuate, that my friend, Mr. Henry, or lawyer Henry, as he has been

pleased to call him, and quessed himself, and that he left to his boldness? Has lawyer Henry was surely quizzing when he gave his opinion respecting the sea-worthiness of the vessel? Here is an insinuation that he has perjured himself. Take the gentleman's explanation; I may have misunderstood him; but, it appears as if that gentleman could impeach characters with impunity; nay, if he chooses, he may write a scandalous paper, it will be forgotten, it will be obliterated. Whatever insinuations may be thrown out against Thomas Passmore; whatever we may say on the subject, will not be only of the duration of a single day; but they will be recorded and pass to futurity. However, my worthy friend might feel himself degraded by walking with Passmore, the solderer of a tin kettle, the name of Thomas Passmore will blot the same historic page with that of Mr. Dallas; and when the people of Pennsylvania, and posterity shall read the works of this transaction, I feel confident that while they drop a tear over the afflictions of this injured man, it will be followed by another, deploring that the talents of my worthy friend should be employed in defending the tyrannical, arbitrary and oppressive exercise of power. I do not impute improper motives to the learned counsel; for I know, that the best of men may sometimes go astray; but, in my opinion, Mr. Passmore ought not to have been thus oppressed; and I venture to say, that if this Impeachment fails, not a man, on any occasion whatever, will seek redress by an Impeachment,

"For what is heaven and earth thus to be moved—the ocean into mountains tost, to waft a feather or to drown a fly."—Is all this commotion of the bar and bench merely to crush the insignificant Thomas Passmore?—no, the cause lies deeper. It is intended to establish the ascendency of the Lawyers, and the supremacy of the Judges, above both Law and the Constitution of their country.

I repeat, that if this Impeachment fails, no man will ever undertake to seek redress in this way. No, the injured, the oppressed individual will suffer and sigh in silent despair. Nay, the very sobs that may be pressed from his heart, may be construed into a contempt, and made the cause of additional sufferings.

My learned friend has told you, that all the doctrines and powers, laid down in those books, as possessed by the Courts in England, are vested in the Supreme Court of Pennsylvania. Nay, then, they could have the offending member cut off. Then, the limbs of a man might be lopped off, his property sequestered, and he confined at the discretion of the Court, and it would not be contrary to common law. But how are we to judge of his respect for this Court? He tells you, and very

tempt consulted. And I appeal to that common understanding, which I presume this honorable Court will be allowed to possess, for the correctness of the inference. Finding this defect, he drew another agreement which authorised the choice of an umpire, at the time he is confident that he told Mr. Passmore it could be of no effect unless it was signed by the Underwriters. Now, in the name of common sense, what does this prove? The first paper authorized no suit, nor the choice of an umpire; the second possessed those requisites, but was without signers; and Mr. Bayard knew nothing of the choice of an umpire. How then is the cause in Court? All the proceedings are under the last agreement, which was not signed, and consequently of no more effect than the agreement itself—a mere *chart blanc*, to use the expression of Mr. Levy. Well, sir, we will suppose the counsel to be right; we will suppose that the case was pending, the award was made, judgment entered, execution issued, and a levy made. By their legal knowledge professional gentlemen endeavor to shew that a cause is even pending after execution issues; I, however, conceive, that by reason of the execution and levy made, that there was no cause depending, unless, agreeably to their own rule of proceeding, exceptions were filed in four days after the award was returned into the office. But the Judges decide absolutely that he has not had legal information—he must have written notice. I ask, sir, what ground is there for this opinion? If I give direct information to the man himself, by word of mouth, the very idea that he must have *written notice* is mere quizzing. Mr. Bayard acknowledges that Mr. Bervet told him, on the Coffee-house steps, that the award had gone against him. In a few minutes after, Passmore tells Bayard the award had gone against him. Well, he tells him that he supposed the award will be in proportion to their respective subscriptions. Mr. Bayard acknowledges that the Sheriff levied upon his goods—I think that was a very broad hint that the award had gone against him. He goes to Mr. Ingersoll, who tells him to wait until he receives legal notice; that he will take charge of the business, and have exceptions filed in due time. But it would appear, that, either through neglect, forgetfulness, or press of business, the exceptions were not filed in time. Then, my learned friend, if I understand him, says—Mr. Levy writes a letter to Mr. Bayard, after execution had issued, informing him, that judgment had gone against him. It would seem that this letter, as if written with ink made of Lethe's oblivionating waters, annihilates all information, previously given, respecting the issue of the award; but, say they, a written notice is necessary; I cannot perceive the necessity of written notice, unless it was to furnish some pretext or other by which he might avoid the payment of a debt. The fact or case seems to be that there could not be any cause pending, and of consequence the judgment had become absolute, because the time had passed by for filing exceptions to the award.

Mr. Bayard had not an opportunity of examining witnesses, and supporting his cause generally, before the referees that he knew nothing of the choice of the umpire that he had no notice of the award. But Mr. Bayard did not deny that he was at the last meeting; he did not deny having conferred with the referees; he did not think it of material consequence whether he saw the award or not; therefore, this part of the argument of my worthy friend must fail.

This is a part of the extraneous matter thrown out by the opposite counsel, a mere tub to amuse us and you; but it corresponds with my learned friend's other conduct in this business.

He has stated to this honorable Court, that when he saw the report of the committee of grievances, and examined how the testimony was founded, he was astonished that any men of common sense could, for a single moment, think of founding an Impeachment upon testimony so contradictory and mutilated. Waiving any comment for the present, on an insinuation contemptuous to the committee, I would remark, that it appears no very high compliment to the understanding of this Court, that the learned counsel should have occupied nearly four days, nearly exhausted his physical and mental strength, I had almost said his sophistry, in attempting to convince you that the Impeachment could not be sustained, when the subject ought not to have occupied a man of common sense a single moment. Does not this appear something like a contempt of this Court? Does not this savour of something like sophistry, declamation, and not argument?

This is mere chaff, and is overwhelming you with a multitude of words, in order to carry you away from the real point.

Mr. Speaker, In my opinion, I stated, that the conduct of the Judges was not authorized by the Constitution and known Laws of this Commonwealth; because there was no cause depending before the Court, of consequence there could be no contempt: and that, even if there was a contempt committed, it was purged by the answers to the interrogatories. That if it was not so purged, the sentence was cruel, arbitrary and not congenial with the mild spirit of our Constitution. I found at once the meaning of the counsel for the respondents, when I met the observation of "you farmers do not understand law; you cannot give a decision in a case of this kind; you must depend on lawyers." I will yield to the gentleman's doctrine, and remind you what a lawyer, in his evidence, stated to you on this subject. Mr. Sampson He will tell you, that the original paper neither contained a sum, nor authorized any suit. Now common sense must decide, that if this article of agreement neither contained, nor authorized a suit, there could not be one depending, and of consequence no contempt

If then it was impossible for Passmore to answer such a question, was it not an insult to common sense to put a question of that kind? I find here the name of Thomas Passmore attached to the answers to the interrogatories, but he is to know nothing about law; and yet on his oath he declares, nay he positively swears, that, to the best of his knowledge and belief, that there was no action pending; or in other words, that he did not know the action was still pending. Well, Thomas Passmore cannot know any thing about law; but we will suppose Mr. Levy ought to know what law is, and he drew the answers to the interrogatories. Did he wish to quiz Mr. Passmore, and get him to perjure himself. But this Court knows, that Mr. Shoemaker says, the Court were satisfied, as to themselves, that no contempt was intended to them; but they were not satisfied, as it respected Mr. Bayard. You will observe, that the learned counsel wishes to make a distinction between the contempts offered to the Court, and those to individuals. He has involved himself again in a serious dilemma; for what has this to do with the Court? The individual or collective Judges have no more the right to say, we are satisfied, as it respects ourselves, but not as it respects the individual, than they have to decide in a suit between the Commonwealth and the Court. They are the Court; and the Court represents the majesty and dignity of the people; but they seem to have forgot who they represented, when they said, you must make concessions to Mr. Bayard; for if they separate themselves from the Court they violate the Constitution, because they have no right to make the distinction between the indignity offered to themselves and the individual; they have no right to decide in their own cause—they, as individuals, when insulted, must pursue their remedy precisely as any other individuals similarly situated. It seems, that if Mr. Passmore had made sufficient atonement to Mr. Bayard, to do away the injury done to him, all the injury to the public is done away; the dignity of Pennsylvania is forgot; no matter, the streams of public justice flow pure and unsullied, not turbid and filthy, as before. All this is done by this Thomas Passmore, this poor, obscure, ignorant, illiterate man, by making concessions to Mr. Bayard. Now, remark, Mr. Bayard's reputation was such, that this libel was more dreadful than the poignard, guided by the hand of the assassin. It is strange, that he should so deeply wound Mr. Bayard. It is passing strange, that so obscure, so worthless, so ignorant, so insignificant a creature, should inflict so deadly a stain. Well, he must be fined and imprisoned for this, and then all is well. But I mean to shew that if he had made atonement to Mr. Bayard, that it would not have satisfied justice, according to their own doctrine; it would not have deterred other men from committing similar outrages; but, says the learned

counsel, they would have been governed by precedents; they would have waved giving judgment by consent; it appears they would have forgot the dignity of the State; you must make concessions, no matter for the streams of public justice. But this mode of proceeding, in my humble opinion, is unconstitutional, because it absolutely is necessary that a man must perjure himself, in order to purge the contempt, according to the arguments of the learned counsel. This is one of the many blessings, conferred upon us by the common law—a man must perjure himself in order to clear himself of a contempt—but then he is to be punished for perjury. This is something like one of the former laws of an eastern State; where almost every poor, unfortunate, ugly old hag, was suspected of witchcraft. How did they test the matter? They threw her into the water; if she swam, she was hanged for a witch; if she drowned, she was innocent. Now justice comes too late, the poor old woman is gone into Abraham's bosom; but I suppose this is no matter, the streams of public justice flow pure and unsullied. Well then, by what do the Court commit Passmore? It is not in the Constitution. Did the laws of the State give the power? No! How much better would it have been to have said, let Mr. Bayard take his remedy some other way. Could he not have brought his civil action against Mr. Passmore?

But how, sir, would it have sounded had the Judges, when the jury came into Court, and before all the witnesses, told Mr. Passmore, you have been guilty of an enormous libel upon Messrs. Pettit and Bayard, which requires great atonement? When the jury come to sit on this case, they hear, that he has been guilty of an enormous libel. How can they decide with impartiality? It is morally impossible. If the learned counsel is correct in his predictions of the inevitable effect which a previous expression of opinion, even by the obscure Passmore, would produce upon a pending trial.

If, after an imprisonment of thirty days, Mr. Passmore comes forward with action for recovering the loss on the insurance; can the jury be supposed to view his claim without prejudice? no, sir, they come forward and decide against him. But the streams of justice have been cleared by his imprisonment. I say again, that if he had satisfied the Court that no contempt was intended or committed against them, Mr. Bayard ought to have been left to seek his remedy in another way.

Mr. Passmore was not punished because he had committed a contempt against the Court, but because he would not make concessions to Mr. Bayard. In what constitution or law do

we find this power given to the Court? I take upon me to say, they have no authority, by law or the constitution, to direct one individual to made an apology to another. I appeal to common sense whether such a power is just, and that it is the law of the land? But let us turn to that precious birth-right, of which we ought to be so proud, the common law. [1 *Tucker's Blackstone*, 69.] Now, this is urged by the counsel for the respondents, and not only urged, but enforced by a solemn appeal to heaven, that he pleads nothing but what is true. He keeps Judge Blackstone as long as he thinks necessary; but we shall see, bye and bye, that Judge Blackstone is beat out of the field by friend Tucker. [*reads further*] Here, sir, we see that even where this birth-right of ours is derived from, it is said that "the reporters sometimes through inaccuracy; (page 72) sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination;" and yet, your life, your property must be staked on this foundation. We see that in every decision by three different gentlemen, there will be three contrary opinions as to some material points. Even in this argument it is admitted that some mystery has crept into the system, but they must all be the law of the land. The party who took down a report with accuracy, dare not publish without the permission of the Court, at the time when those precedents they have adduced were reported. Again, we should accompany this authority with the history of the times in which these reports were made. If he did publish without permission, under the broad law of contempts he would be fined and imprisoned. In all the cases, it is not only necessary that he should be correct, but that he should be able to see the very heart of the judge, to know the very motives that influenced him in giving his decision.

The gentleman has said, there was an impropriety in the managers applying for professional assistance to the relatives of the Judges. I will not pay the gentleman so poor a compliment as to say that it would operate upon the decision; or that it would deter them. I wish this honorable Senate to bear in mind that almost all the precedents read, have been drawn from the courts of chancery, and are all cases between the king and the people. What are the rights of the people in that country, when they come in competition with the interests of the crown? They are like the baseless fabric of a vision. What, say the writers on the government of England? They all speak of the king, of the omnipotent parliament—the constituent parts of which is king, lords spiritual and temporal, and the commons, but not a word of the people. The swinish multitude were made for kings and lords, and are trodden un-

der foot. Therefore, when the case is king against the people, the judges generally decide in favor of the crown, as it is against the majesty of the king to decide otherwise. Shall we go to that country for precedents, whose government is diametrically opposite to ours?

And it would appear, notwithstanding the encomiums lavished on them by the learned counsel, that the streams of public justice could not be kept pure without this mode of punishing contemps. But in this country the sovereign people are represented in a court of justice; and how, in this instance, have the people been treated? But, our learned friend says, they possess the powers of a court of king's bench; and indeed they seem to have considered themselves in a court of king's bench. Here we find the people have been forgotten. Shall we then be governed by precedents drawn from a country hostile to us; from a government hostile to our government? I am of opinion, that, with respect to mere questions of property, we may derive very useful information from that country; but not with respect to the liberty of the citizen; for there the king is so mighty and immaculate that he can do no wrong; nay more, no man dare say he can do wrong.

Gentlemen of the Senate,

I beg you to carry this in your minds, that your decision will go out to the world, to the citizens of Pennsylvania. You cannot carry with you all the volumes of reports that have been produced—you cannot detail perhaps all the arguments of the counsel—and if you could, it would appear that all these arguments are drawn from the reports of the English books—and what will they say? That you have not used your own opinion; that you have been governed by British precedents; precedents from an aristocracy—from a monarchy of the most corrupt nature. I cannot suffer the idea to exist.

There is a sovereign people which we ought to have in view. We are sent here as the guardians of their rights and liberties; and whatever may be your decision in this case, you ought to do it under an impression of responsibility to the people; and you must and will be accountable, and so must I for my conduct; the people will not pass us by. If you do not come forward and do your duty, you are dismissed—I have been dismissed myself, and I rejoice that the people had the right so to do—and I ardently hope they never may be robbed of the inestimable privilege of the right of suffrage. In society there is no more efficient restraint upon mankind, or security for correctness of conduct, than a continual impression of responsibility. But in order to enable you to form a correct opinion on the authorities that were read, it would be necessary to read

the history of the times in which those were made; I would read them to you, but it is impossible for me to turn over all those volumes, which would no doubt fatigue you in the research; however, your own recollections will furnish you with a competent idea of the manner in which those decisions were made.

Among the various cases, cited by the learned counsel, there is one abominable decision, in which a man was punished for a contempt because he did not understand a learned language; and yet you are called upon to sanction the exercise of this authority; which, if established, would prostrate our dearest rights at the feet of a capricious set of men, clothed with the semblance of justice. I pray you, gentlemen, to turn your attention to the history of those times, I will not attempt to say law, but history, and I am confident it will appear to this Court that I am correct, which is all I wish; for I am confident they possess sufficient integrity and independence to decide with firmness.

I must confess that I have not had sufficient time since last night to prepare myself as I could have wished; for so much time had been consumed in discussing this subject, that I had no idea of speaking again, but in consequence of the managers not being able to procure more than one counsel to assist them, it became necessary that some one of us should give some aid to him—but, in the short time allowed me, I have endeavored to do the subject all the justice in my power.

[4 *Hume's Eng.* 275.]—(*See Appendix, note M* 3.)—He, though it appears that he was a chancellor—a judge—and yet took bribes—and for what purpose? To determine causes in favor of the party that paid him. If he was of this avaricious disposition; if he took bribes, (and we know a bribe will operate on the minds of men) I would not respect his decisions, for they are made with corrupt views. He even quotes the old books for precedents in support of his decision. Now, sir, I think this Court must be struck with the conduct of lord chancellor Bacon; and yet lord Bacon has decided cases which are stated to you as correct, and so you are bound to decide on your oaths,—[*reads further.*] This is the most astonishing thing to me, that a man who receives a bribe should be able to decide correctly. But if he had not been discovered, he would have been our glorious instructor. I think some further information may be obtained by refering to another part of this book. [6. *Hume's Eng.* 217.]—(*See Appendix, note N* 3.) We have had precedents from Ireland with a kind of sneery "that if we disliked British precedents, perhaps Irish precedents would be more palatable."—Let any man cast his eye

over that wide and gloomy theatre of oppressed Ireland, and perhaps he may catch a glance of scenes too full of horror not to agitate, not to rack the imagination—see that unhappy country oppressed by the tyranny of Great-Britain, those poor unhappy creatures, persecuted and driven from their native country—while some are incarcerated for life—or executed to appease the rage of a bloody tyrant—see a Rowan, Orr and Jackson persecuted in a most cruel manner. Welcome, thrice welcome, ye noble patriots, to this asylum of the oppressed! Welcome to this land of liberty! Welcome, thrice welcome, ye Irish patriots, to me and to this country, and enjoy freedom—but heaven forbid that these dreadful precedents should follow you. The judges possess all the power they possibly can expect; but, says the learned counsel, they are vested with this power of summary process, nay, that they are sworn to put it in practice. If they possess this power, and a man should be attached for contempt—he is punished—afterwards it appears that he was innocent—he may appeal to the high court of errors and appeals, they will reverse the judgment of the supreme court; but this is all, as the judges are not liable for an error in judgment; there is no possibility of redress. By following the precedents of the British tyrants, they have power to amputate a hand, or bore the tongue of an offender. If we come forward and challenge the legality of this power, we are answered it is a law question—we cannot decide upon it—the judges must decide; they decide that they possess the power under the common law, which is a broad mantle and covers the whole; this is the inevitable result of adopting the doctrine laid down by the counsel for the respondents.

Now, I ask, would it not be useful for every member of this Senate, before he decides, to inquire what is the state of history respecting lord Hardwicke. You have been told of lord Hardwicke that he was the ornament of human nature; but a reference to history will tell us that he was a servile courtier, a mere creature of the ministry, although none of his verdicts were ever set aside. And this "ornament of human nature" has made decisions which are to be followed by the enlightened people of Pennsylvania! But, sir, after the gentlemen has gone through British precedents, he tells you that he only referred to them in order to assist you in getting information. I am very willing to read those precedents for the sake of information; but he says afterwards, this Court is bound by common law, and in common we must be bound by those books; no matter whether the decision was made one, two or three hundred years ago—the older the better. He might as well insist that this globe, instead of being globular must be a plain! Must we shut our eyes and ears against information, and draw precedents from that country of oppression—that country where

the people are nothing, and the monarchy every thing—that country of tyranny

" Where oppression, with her heart
Wrapt up in treble brass, besiege mankind,
Gods image disinherited of day
Here plung'd in mines, forgets a sun was made;
There, beings deathless as their haughty lord,
Are hammer'd to the galling oar for life
And plow the winter's wave and reap despair.
Some for hard masters, broken under arms
In battle lopt away, with half their limbs,
Beg bitter bread thro' realms their valour sav'd,
If so the *tyrant*, or his minion doom."

And shall we be governed by precedents drawn from such a source?

I confess, Mr. Speaker, that I feel exhausted; I have not the same physical strength that my worthy friend Mr. Dallas has, and request to be indulged with a short recess.

Adjourned 'till ten o'clock on Monday morning.

MONDAY, January 25, 1805.

Mr. BOILEAU—in continuation.

Mr. Speaker, and Gentlemen of the Senate,

Permit me once more to claim your attention while I make a few further observations on this important question. It has been said, that the expence of this prosecution would almost equal that of a short session of the Legislature; but this is not to be regarded, for when we consider the importance of the question, the people will excuse us for fully investigating the subject. If our antagonists had been so cautious of incurring expence, they would have done well to have considered it earlier, and not led us such a wild goose chase after the brig Minerva, and not have occupied nearly four days in discussing a question, which the learned gentleman said required but a moments consideration by men of common sense. When we recollect the revolutionary war, we find that doctrines have been advanced hostile to the first principles of the revolution—hostile to the State and its laws—hostile to all the people hold dear.

I said, when I first addressed you, that I could not inform this honorable Court, that they possessed sufficient good sense and information to conceive the subject better than I could describe it to them. With this view I will promptly proceed

to make a few observations. It will be recollected, that on Saturday, when I was about to read a certain paper, I was prevented from going on. But still, since last Saturday an officer of government said that Mr. Passmore was punished for perjury. I say that this assertion is unfounded, for I have papers and documents to prove the contrary. I have certificates from the Jury, declaring that it was not on account of the repeal of the law, but because there were no grounds for the prosecution, that they found a verdict in his favor. I hope I shall be justified in attempting at least to remove the impression this assertion may have made, without incurring the imputation of being the advocate of Thomas Passmore.

Mr. Speaker, on Saturday I stated to you, what I conceived to be all important on the subject of British precedents; I will read a few other extracts from Hume's history of England, to illustrate that position; I have since turned over a few more pages of that history. Permit me once more to call your attention to that subject. It has been insinuated that this honorable Court is not only ignorant of the municipal, the civil and the common law, but even ignorant of history and grammar itself. [4 *Hume's Eng.* 169.]—*(See Appendix, note* O 3.*)* In answer to this it may be said, that the Judges were not then independent; I beg this honorable Court to recollect, that they are still dependent—that they are not now independent—they may be nominally so, but they look up to the crown for all honors and emoluments. [6 *Hume's Eng.* 225.]—*(See Appendix, note* P 3.*)* Now it would appear that the Judges of our Supreme Court seem to have believed that they have the same power to make laws to suit themselves in cases where there appears to be no statute, and fly in the face of the Constitution. For heavens sake shall we draw a precedent from a country whose first law is, that the king can do no wrong? [*continues to read extracts.*] I do not read these extracts merely for yourselves only, but they will go out to the world, and I wish those precedents to be accompanied by the history of the times in which they were established. [6 *Hume's England*, 163.]—*(See Appendix, note* Q 3.*)* Here you see even a Jury terrified into a verdict—here you see that Judges have been bribed—that Judges have been vindictive, tyrannical and malignant. [6 *Hume's Eng.* 114.] Mr. Speaker, we have been told by the learned gentlemen, that Lord Hardwicke was a man of eminent talents and amiable manners; nay, more, that he was an ornament to human nature. Let me give you some idea of this "ornament of human nature." I stated to this honorable Court on Saturday, from my memory, what was the character of this man; that he would bend to any ministry, and was totally subservient to the crown. [*Smollet's continuation of the*

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history of Eng. 307.]—*(See Appendix, note* R 3.*)* Here you have a short specimen of the conduct of this "ornament of human nature," whose decisions are to guide posterity and regulate your decision on this occasion. 'Twas enough that the paltry sycophant should insult the Legislature with charges of ignorance—it was enough that men hostile to republicanism should throw stigmas upon this honorable Court: but when a man whose talents, and high standing in society, and professing the same political creed, would insinuate that this Court do not understand law nor grammar, nor history itself, is rather too much. But I deny the charge, and let my name go as far as it can go, in support of my assertion, that the charge of ignorance of the Constitution, law or history does not attach to the legislature of Pennsylvania. We have had precedents read from English writers in abundance; let us take a view of them. We find that in one case a man was punished for a contempt after the suit was at an end. We find in another that a man was punished for not understanding a learned language. In another case, a man and woman were married, and it appears that all the other persons present at the wedding, were found guilty of a contempt, because the lady was a minor, and under the guardianship of the Lord Chancellor. [*Moseley's reports*, 251.]—*(See Appendix, note N, p.* 22.*)* In this contradictory history of British precedents, what is the doctrine adduced? He says, if he fails to demonstrate to you that the Supreme Court does not possess all those powers, he will fail more than ever he failed in his life. Good heavens! this is a monster, a horrible monster, which to be hated, needs but to be seen. Present this to the people, and tell them that the Judges of the Supreme Court possess all the powers of the British courts, and follow all their precedents; nay, that they are bound by a solemn oath to put them in force, and what will be their horror and amazement. I shall read one more precedent before I dismiss this part of the subject. [1 *Dall. reports*, 319.]—*(See Appendix, note U U.)* Here we find not only the common law of England must be adhered to by our Judges, but they may even introduce the statute laws of England. By this doctrine they may consider it necessary to adopt all the laws of England; we may quit legislation and go home, and they will do all the business of the Legislature, for the Judges can adopt all the common law—all the statute laws of England. The citizens of Pennsylvania, I hope, will see the enormous power claimed by the Judges of the Supreme Court, and I pray that they may look at this business in a proper point of view. My worthy friend says he appeals to common sense—before that tribunal I will cheerfully appeal and join issue with him; for such is the irresistable power with which truth and reason waves their sceptre over their human intellect, that no display of genius, of eloquence and talents can reduce it into subjection.

I now turn to *Addison's Trial, page* 92.—*(See Appendix, note S* 3.*)* I thank my worthy friend for his name to this opinion. This in corroboration of all the authorities I have read.

We now leave British precedents; peace to their manes! let them rest in an eternal sleep! let them never be produced again, unless they are put into a more just, rational form, and consistent with justice and common sense. Now touching the cause of the Revolution. I had stated that it originated in the tyranny of Great-Britain; but what does my learned friend state as the origin? Why he says it originated in the proud spirit of liberty—that it was a mere matter of speculation—that the Magna Charta was equal to our Constitution. I really believe the gentleman did not recollect who he was addressing—On what theatre must he then have been acting—surely he could not have been in this country, or he could not have so soon forgotten the principles of the Revolution—he did not recollect that the Magna Charta was in the power of the Parliament at any time to change it. You, Mr. Speaker, were personally acquainted with the principles and took an early and active part in the Revolution. When this Revolution commenced I was but a child, but the impression it made, at that time, on my heart, will never be effaced until the cold hand of death presses heavy upon it. Yes, sir, though a child and going to school, my footsteps have been arrested by the noise of cannon roaring against the liberties of my country, and I then felt the sacred thrill, which my bosom has ever cherished with unceasing ardor. The honorable Court will excuse me, while I stop a moment to drop a tear to the memory of a beloved parent, who was then sending me to school to learn a language which one day may preserve me from committing a contempt of Court—Yes, Mr. Speaker, the cursed iron hand of tyranny banished my ancestors from their native country of France, to seek an asylum in this land of liberty.

But, sir, as some of the precedents that have been cited are of pernicious tendency, and will go out to the people, let us, if possible, send an antidote with them. When the gentleman attempts to introduce such doctrines, as he has done, respecting the origin of the Revolution, let us turn to the history of that time, and see whether it originated in the way the gentleman has asserted that it did. [*Votes of the Assembly of* 1776, *page* 43.]—*(See Appendix, note T* 3.*)* I do not read this to inform you, but to the citizens of Pennsylvania, in order that they may recall in their minds those times which seem to be forgotten. [*reads further.*] This is in the hands of every man, let him read for himself, and when he hears it asserted that our Revolution originated in a mere speculation, let him boldly deny the position. But we are to recollect that those laws

are framed to govern a monarchy; shall they be the laws to govern a free people!—that the precedents drawn from that monarchy shall be the law of the land.

The learned counsel has told us, "that man has no rights but what is conferred upon him by society;" but whether it is a quotation or not, I am not able to decide. My creed is, that a man retains all the rights that he has not transferred from himself by his own voluntary act. This is my creed, and the creed of every man who now hears me speak, who understands the principles of civil liberty. But it has been said that I stood on slippery ground when I read from the proceedings of the convention, and said it was done with a design to protect personal liberty, more particularly the rights of the people. What does the resolution say, that was penned by Mr. Ross? It proves that if they were not sincere they have acted with duplicity; or shall I say this was the sophistry of a lawyer; but however improper their motives might have been, they have answered the purpose.

Mr. DALLAS. When the honorable manager was reading the authority, I did not wish to interrupt him; but when he involves in my observations errors that may affect my worthy clients, I feel it an indispensable duty to correct his statement. What I stated was simply this: the manager had said, that the convention was called for the express purpose of affording greater security to the liberties of the citizen; I said no, that it was called by a triumphant party with different views than those stated by the manager.

Mr. RODNEY. I believe the honorable manager has not deviated from strict propriety; I think he was merely stating the subject hypothetically.

Mr. BOILEAU. I was not about to attribute any improper motives to the convention; if any did exist they had produced the very opposite effect they must have been intended to do. I will now shew that the new Constitution affords greater security to the liberty of the people than the old Constitution did. [*Bill of Rights, section* 13.]—(*See Appendix, note U* 3.)

It was thought in framing the new Constitution, that the Judges ought to be more independent than they were before; perhaps they have thought themselves too independent; it is the department of government from which the greatest danger, by their occupancy of office, is to be apprehended; they are more attached to forms, and are created more obsequiously, for they can set down a lawyer or commit him or any other person without any ceremony; hence then the propriety of

watchfulness over them. It may be apposite to this subject to read 1 *Tuck. Black.* 30 *and* 39.—*(See Appendix, note V 3.)* At first it excites little fear or apprehension, but next it rises aloft, last of all it approaches even to the sun and hides its head in the clouds.

"*Malum, quo non aliud velocius ullum:*
"*Mobilitate viget, viresque adquirit eundo;*
"*Parva metu primo; mox sese attollit in auras,*
"*Ingrediturque solo, et caput inter nubila condit.*"

Power encreases one step after another; and we know that men who have power rarely or never relinquish it, but step by step they go on to enlarge it; the progress of tyranny is slow but sure; it is not every day that a Cæsar or a Bonaparte rises into view and subjects the liberties of the people by the logic of the sword; no, it is by slow and almost imperceptible means that tyranny strengthens itself, and at length liberty is laid prostrate at the feet of power. [1 *Tuck. Black.* 378 *and* 394.]—*(See Appendix, note W 3.)* One of the principal objects of the Revolution was to establish a government of laws and not of men; but in vain have our fathers and brothers bled if we depart from those very laws—if we establish a government of men and not of laws, we found a system of tyranny and oppression of the most odious description. [1 *Tuck. Black.* 405.]—*(See Appendix, note X 3.)* I read this book because it conveys my sentiments, and is the production of a man of information and eminence—where his principles coincide with my own, I wish to give him as my authority. [1 *Tuck. Black.* 409 *and* 426.]—*(See Appendix, note Y 3.)* I might go on to read a number more of authorities of the same kind, but I beg the honorable Senate to read for themselves—to pay attention to this book; at the same time exercise their own judgment, and rely not upon the opinion of another.

The Senate, I hope, will excuse me, if my arguments appear desultory; the arguments of my opponent has led me to it, and the short time allowed me to prepare my reply; but still their turn I hope, will bear on the main question. [4 *Tuck. Black. Appendix, note B, p.* 11.]—*(See Appendix, note Z 3.)* What I wish to impress on the minds of this Court, is, that they will lean upon their own understanding, not on that of others; then you will be able to give a decision, and I trust you will give a firm one. [4 *Tuck. Black.* 12.]—*(See Appendix, note A 4.)* A constructive contempt may be a question of danger; if I publish a paper I may be brought up for a contempt, when I know nothing of it; am not prepared to make a defence; I do not know whether an action is depending or not—but I am punished by fine and imprisonment. This is certainly next to constructive treason; it is true they do not take my life; but they take away my liberty and my property;

and those are next to life. The learned counsel has quoted Judge Chase's opinion—permit me to read one, not as my opinion, but as a set off against the one he has read. [1 *Dall. Rept.* 319.]—*(See Appendix, note U u.)* I cannot conceive how technical men can read more than men of common sense. How can a lad who has been in a lawyer's shop know more than even the patriotic Findley, as the learned counsel was pleased to call him; I cannot conceive by what process of the human intellect, the atmosphere of a lawyer's office, should thus, almost instantaneously produce such an illumination. If such a young man should tell the Speaker, that he knew nothing about law or Constitution, I should say he was a very apt scholar indeed, and had a very able teacher in impudence. But you cannot decide on constitutional ground—you are an honorable Court, but you do not understand the law or Constitution. We shall see that the power they contend for is not given by the Constitution. [*See Constitution of Pennsylvania, act 5.*] From this part of the Constitution they derive this omnipotent power. I shall read again from 1 *Tucker's Blackstone, page 87.—(See Appendix, note B 4.)* Thus, by this construction of the Constitution there is no explanation necessary. Let us now come down to the laws of our own State, which I thought were to be the rule for my conduct, until my honorable friend told me otherwise. [*State Laws, Cury's Ed.* 101.]—*(See Appendix, note C 4.)* If my idea of the Constitution of the State is correct, they cannot go beyond the limits of this act. What is the use of specifications, if by one sweeping clause they make the common law do every thing? [*reads further.*] Why are other powers defined? Why, in the name of common sense, grant them other powers, when by one sweeping clause they can do what they list? [*Sect.* 28.] Here is another power granted to chastise Attornies if they misbehave; this appears to me, according to my humble apprehension, to be common sense; but why define a power if they can do what they please by introducing the common law? Upon this law all the others depend, and if this fails, all the others must fall to the ground. Will my learned friend confess, that he is guilty, and submit to the mercy of this Court? I fear he will not.

It evidently was intended that the Constitution should control all laws repugnant to this instrument. Yet, I say, that after the Constitution was adopted it restrained the continuation of that power. [4 *St. L.* 60.]—*(See Appendix, note D 4.)* [3 *St. L.* 7.]—*(See Appendix, note E 4.)* I only refer to these in order to shew that the Legislature was at all times anxious to preserve the liberties of the people. [*Sect.* 13.] You see the great care the Legislature of that time took to secure and preserve our rights; but in vain are

all these provisions, if by a constructive contempt, the Court have power to fine and imprison.

Now I contend that the Judges ought to follow the spirit of the laws of this State and the spirit of our Constitution, and not of a Constitution hostile to our government, our manners and our customs. Is the Constitution a mere nose of wax, which the Judges can shape just as they please? If you have offended my friend, you must make atonement, or I will send you to prison. I appeal, whether this is justice, to that common law written on your hearts by the almighty law giver of the human race. The gentleman, in my opinion, has been travelling out of his road, for he fancies the castles he has built in the air, and which are falling into ruins, to be the ruins of that strong fabric we are endeavoring to raise; he has raised up and beat down his own castles, supposing that when he had done, he had vanquished all opposition. He has occupied a great deal of time in reading authorities, from British precedents, and endeavored to establish them as the law of the land; I have not strength to pursue him, but my learned friend will, I am sure pursue him; and, I think fatally to his argument. [2 *Godwin's Political Justice*, 290.]—(*See Appendix*, *note I* 4.) I did not say any thing about quibbles—sophistry was my word—but here it is called law jargon—I do not say it is correct—I read the authority—and the gentleman says, that we are to be governed by precedent. We now come down to our own country precedents. Bradford's case is mentioned; he had published in a newspaper respecting the merits of a cause in Court. Now try this by the bed of Procrustes, and see if you can make Mr. Passmore's case fit this; no, I am confident you cannot; he only said this, that Mr. Bayard was meanly attempting to keep him out of his money three months longer.

But in the name of goodness, if lawyers disagree, ought Mr. Passmore to suffer. Permit me to go back, as the short time I have had, has not enabled me to arrange my ideas in the order I could wish; Mr. Bayard tells you in his testimony, that Mr. Berrett told him the award had gone against him, and that Mr. Passmore told him the same thing; last of all the Sheriff gave him a hint, and Mr. Bayard certainly took the hint; for, upon this information, he applied to an Attorney for counsel. But it happens that the Attorney does not do it in time. Mr. Levy writes him a letter, which by an extraordinary process obliterates all notice of the award from the mind of Mr. Bayard, and he files exceptions. The learned counsel put the question to every witness, is not this cause now pending before this honorable Court? Now we know that the Supreme Court cannot draw a case into Court in order to make evidence in their

fever. Well, but Mr. Bradford is dismissed—he is not imprisoned—why so, if it is true that this is legal, why deviate from the law? Because this bed will not fit Mr. Passmore. Try another. Mr. Carrol, the bishop of the Catholic church, issues the thunders of the church against certain individuals, parties to a suit then pending—the Court issue their thunders against him—he comes before the Court, and tells them that he does not know that a cause was pending. The gentlemen say we will hold this case under advisement! Advisement! That is, we are not willing to lose the power, but let him go. This case then does not fit. Let us try another. Rolph came into Court and made an atonement to the profession. This is the rub—"*atonement to the profession.*"—Now the streams of justice flow pure and placid, not turbid and foul. What was the conduct of Mr. Kitchen? Was he not as much to blame as Mr. Passmore? If he had determined, as a good man ought to have done, to destroy the paper, nothing more would have been known in the business.

Did Mr. Bayard state to the Court what Mr. Passmore told him respecting the award? In the case of Rolph the Court seemed to be satisfied with the atonement made to the bar, and dismissed him. Well, but this does not carry them through. Mr. Duane's case, I think he was fined and imprisoned—true, but Mr. Duane did not apply for the impeachment of the Judges—he knew he could get no redress, by applying to the then House of Representatives of the United States—he knew that they would give him no redress. We come now to the great case of Oswald; this fits just to a shaving. [*Osw. Case, for which see Appendix.*] One principal reason for punishing a contempt of this kind is, that it may not improperly bias the minds of the Jury. The case of Mr. Passmore was not for Jury trial—the Court were to determine whether the exceptions were valid or not—this could only operate upon the Judges; and are the Judges so much their own enemies, that they cannot trust their own minds? therefore it could not have any effect in Mr. Passmore's case, or if it had, it would be against him. [*Reads part of Henry's last testimony.*]—*(See page* 121 *of this book.)* Here he is to be "*laid by the heels.*" Mr. Passmore is to be "*laid on his back.*" Now how does Oswald's case fit Mr. Passmore? Here is a direct application to the people; expressly to the very men who are to sit on the Jury, and hints that the Judges are prejudiced against him; Mr. Sampson Levy says, Mr. Passmore was humble, and he wished to impress it on the minds of the Court, that he meant no contempt to them. Here is another point, Oswald refused to answer interrogatories. But it seems if he does answer interrogatories he is sent to prison—if he does not answer he is also sent to prison. The last case stated by my worthy

friend, is that of the farmer and the doctor. The farmer gets sick; sends for the doctor; he comes and finds the man very sick, feels his pulse, looks wise; well, he must be governed by precedent; he looks at a book, and finds bleeding and warm water recommended; he then bleeds him freely and drenches him well with warm water—when the man recovers the doctor waits on him with his bill—he refuses to pay—the farmer goes to an attorney, gives him a fee—the attorney looks wise also—tumbles over volumes of law books—tells the farmer the doctor is right—the doctor has a right to your blood and I to your money. How so, says the farmer? The law guarantees the right, says the lawyer. The constitution or some law of the State? no—what law then? Why the common law; from time immemorial the doctors may take the blood and the lawyers the money, and if you make any further objections you shall be committed for a contempt. I understand this action is removed into Court by certiorari, and I feel a little apprehensive my learned friend may be committed for a contempt. I do not mean to throw any contempt on the reputation of a good man and a learned physician. This is an abuse of the act, and if so it must be condemned. Could I think the case would furnish any light to the Senate, I should have no objection to discuss the constitutionality of the law. But here he and I have been speaking of an action now pending in Court; and can they be serious when they tell you this contempt of Mr. Passmore's is such an enormous offence; and the dangers that might result to society if Passmore was to pass unnoticed. I confess, Mr. Speaker, that I had no wish to treat this subject in this manner, but we are dragged into it, and we must take them in their own way and fight them with their own weapons.

If they were serious that this contempt could be treated in this way, one of the evidences, brought before you, would not, instead of relating simple facts, have undertaken to reason and say, that this impeachment was well founded. [*Reads from Montesquieu's Spirit of Laws, Chap.* 16.] Any thing may be said against the Legislature, every species of obloquy, indignity and contempt may be poured out with impunity, no common law interposes, but not a word against the lawyers, the Court or a favorite of the Court—no, not a word—this motto is written on their front,

procul, procul este profani.

keep at a distance—a respectful and awful distance—ye profane, ye vulgar herd—at the hazzard of fine and imprisonment.

There is one paper which I had forgotten to read, which will give some information on this subject. [*Commences the reading of Mr. Lewis's opinion to Passmore in writing, a copy of which we could not conveniently procure.*]

Mr. Ingersoll. Mr. Speaker, I will not object to any thing that is regular; but I will appeal to the counsel for the managers

if this proceeding is correct or would be tolerated in any regular court of justice.

Mr. RODNEY. Mr. Speaker, I have no hesitation in saying it is perfectly regular after the mode of argument pursued by the learned counsel; you have heard extracts from newspapers read by that gentleman; you have had Mr. Tucker's opinion read over and over again; although he is a high legal character, yet those opinions bore very distantly on the case. The manager wishes to read this in order to shew that the father, and the author indeed, of the introduction of this doctrine of contempts in Pennsylvania, speaks in explicit terms in favor of an impeachment on the present occasion. Surely if the opinion of Doctor Tucker, of Virginia, is to weigh in this case, then surely the opinion of one of the most able and eminent counsel of the Pennsylvania bar may be read. I do apprehend from the wide scope, and from the liberality shewn in the course of this prosecution, the reading of that opinion will not be denied to us. It is nothing more than an act of justice to the part of the prosecution, and to this honorable Court, as I am confident they would not wish to exclude a ray of light.

Mr. DALLAS. It is obvious that this is not a regular authority, but mere matter of opinion, and as such I can do nothing more but to enter, in a solemn manner, my protest against its being read. True it is that I read Tucker's Blackstone, and an extract from a newspaper, to shew upon general principles the very reason of the common law—These were the reports of judicial decisions or well digested comments upon them; but there never was an idea entertained that an opinion given ex post facto, was ever allowed to be read in evidence. As a lawyer the worthy gentleman who wrote the letter is entitled to his fee. But it is not proper authority to be read here. Let him read all the system of Utopia—all the vile trash of Godwin; the gentleman may read even his doctrine that fornication is preferable to matrimony, but I must object to the reading of that paper.

Mr. RODNEY. It would seem that if this had been printed in a book, it would be competent evidence. When we consider that it is derived from the fountain head of the cause now at issue, we ought to be allowed at least to read it. It is not evidence, I agree with the gentleman; but when he reflects on the liberality which has been extended to the honorable counsel, I hope that the same liberality will be extended to us. However we submit the matter to this Court, they have the power of deciding in such cases, and I hope they will exercise it on the present occasion.

Mr. DALLAS. We agree to it at once; but in order to avoid establishing a precedent, we declare that it is done expressly at the instance of the prosecution.

Mr. WHITEHILL, *(Speaker.)* If the gentlemen can agree themselves it will be better.

Mr. Boileau. [*Reads part of Mr. Lewis's opinion.*] This, sir, is the opinion of Mr. Lewis, who was the advocate for the imprisonment of Oswald.

Mr. Dallas. I wish the whole of the opinion to be read.

Mr. Boileau. [*Reads the residue.*]

Mr. Dallas. Sir, give me leave to thank the gentleman for reading that paper. I have often been told of it, but never heard it read before.

Mr. Boileau. The gentleman is perfectly welcome to it. Here I would remark, that this is the opinion of the very man who advocated the measure in the case of Oswald, and who has said that that case could not fit Mr. Passmore. It is not at all strange that Messrs. M'Kean and Lewis should have acted as they did; that they should not depart, in the convention, from an opinion once publicly expressed. My learned opponent has reasoned very curiously indeed on the "Hundred dollar act." He seems to think that if the Legislature do a wrong or unconstitutional act, the Judges are justified in following their example. If the Legislature have done an unconstitutional act, they are responsible for it. To whom? To the people whose servants they are; and they will send others better instructed to the Legislature who will repeal the act; but the Judges are not responsible to the people. It has been intimated by the learned counsel, that before the High Court of Errors and Appeals, or the honorable and learned Judges of the Supreme Court, or before the Judges of the Court of Common Pleas, and some others, a man was as likely to get justice done him in such a case as this, as before the high, the unbiassed, and unprejudiced tribunal before which I have the honor now to stand. I deny the proposition; there is not the same chance that an oppressed individual will get justice there as ready as before a Court like this. But shall one officer of the State sit in judgment on another officer entirely independent of him or his authority? No, sir, this is the proper Court to examine into cases of this kind, and before this Court must they be tried, and you must decide the controversy. You are responsible for your conduct; you must be responsible to this higher tribunal; the people will sit in judgment on your conduct. Nor will it do for you to say, you followed British precedents, read to you from the days of Alfred, down to those of George the third, king of the united kingdoms of great Britain and Ireland, defender of the faith? This will not do; you must be able to shew that your judgment was formed on the laws and on the Constitution, and that you have, as I said before, relied on your own opinions, not on those of another man. You have the laws and the Constitution before you, and by them will you also be tested. I was well aware that an attempt would be made to overwhelm you with a multiplicity of authorities; but I trust it will prove futile. Owing to an indisposition I am not able to conclude; If the Court

will indulge me with an hour in the afternoon, I will be grateful for the favor. Adjourned.

SAME DAY, P. M.

Mr. BOILEAU—in continuation.

Once more I ask your patience and attention for a few moments, while I make some further observations on this interesting cause now at issue before you. To me it is unpleasant to be placed in my present situation, but I am appointed to the task, and I would be unworthy of confidence, did I not do my duty to the best of my ability. I might follow the example of the learned counsel, and read a number of authorities from the books, which, though not immediately applicable, may bear upon the main point of this case; here are one or two books which I wish to read on this account. [1*st Vol. Min.* 73.] From these extracts it will appear that I was correct in stating the cause of the origin of the American Revolution. I beg leave to read another authority. [*Jeff. Notes, Rawle's Edit.* 249. *Another Edit.* 191.]—*(See Appendix, note M* 4.*)* This I hope will not be considered as the effusions of a maniac, or the Utopian scheme of a theoretick philosopher or enthusiast. Sorry I am to say, that the conduct of men, now before your bar, if not checked, will render our fond hopes of realizing a free government unavailing, and will prove a mere Utopian scheme indeed.

I feel it my duty to take some notice of what fell from the learned counsel. Insinuations have been thrown out against the character of Mr. Henry; I venture to assert that his character would not suffer by a competition with my learned friend's and mine. Mr. Passmore came from Massachusetts; his father served in the revolutionary war; he fought and bled and died for our independence. Mr. Dallas has said that Mr. Henry has been a volunteer—admit it for arguments sake—and what does it amount to—precisely to this, that Mr. Henry has stept forward to vindicate the rights of his fellow citizens, and procure justice to an oppressed individual.

Mr. Passmore is said to have quizzed Mr. Bayard and the other Underwriters, out of a considerable sum of money; this does not appear to have been the case; one thing, however, appears, that Mr. Passmore has been partially treated; and he appears to have paid to different gentlemen, four hundred and thirty-five dollars for his Attornies fees—thus has Mr. Passmore been quizzed. I hold a paper in my hand, which I will put into the hands of the learned counsel for the respondents, as it would be disagreeable to read it in this house. But if they knew of those judgments against Mr. Passmore, why should they attempt to increase his difficulties, and destroy him?

I now proceed to the last part of my argument; that the punishment inflicted on Mr. Passmore was mild and moderate, mark-

ed with humanity and forbearance. I believe it to be a correct principle, that punishment should always be proportioned to the crime, and that in a republic the punishments ought not to be so severe as in a monarchy. These sentiments have some authority to support them; and as I rather give the sentiments of eminent men than my own, I shall refer to Beccaria on Punishments. [*Beccaria on Crimes and Punishments, pages 2 and 169.*] This is correct sound reasoning; no man of sound understanding, and if his mind is composed as mine, and I trust yours is, will contradict this doctrine. This will be further corroborated by turning to [1 *Montesquieu's Spirit of Laws*, 103.]—*(See Appendix, note Q 4.)* What impressions must it make on the mind of a man, when he must make concessions to another who he supposes has injured him; he must experience indignant feelings, or he is unworthy of a republican government. [*Do.* 104.] Severe punishments destroy the very germe of liberty in every country. [*Do.* 108.] The last that I shall read from this book is in [112.] On principles like these was our Constitution founded. We find it recorded in the Bill of Rights, section 13, "That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Compare this doctrine and the proceedings of the Supreme Court against Mr. Passmore. What did he do to merit the punishment—to be committed to prison for thirty days and pay a fine of fifty dollars? He was punished because he would not make concessions to Mr. Bayard; Mr. Passmore shewed every disposition to make any concessions to the Court that might be deemed necessary—nay, the Court acknowledged that they were satisfied. In what law—in what Constitution can we find any authority for this proceeding? He is told, imperiously, you must make concessions to Mr. Bayard; this he would not do, because he thought Mr. Bayard had injured him. I ask, how any man, possessing the feelings or the spirit of a man, could make such concessions. It is impossible that any rational man that should sit on a Jury-trial could be operated upon by the libel of Passmore, so as to prejudice him against Bayard—No, sir, the contrary effect would actually have been produced. When he had satisfied the Court, I think they ought to have left Mr. Bayard to his remedy. The learned counsel tells us to look at Mr. Bayard. This is the first time that I ever heard it intimated that beauty was taken into consideration in a court of justice; must a man, with bad features, avoid shewing an ugly face in court, lest he may be punished for a contempt of the court? Were beauty to be the criterion by which a court is to decide between adverse parties, I apprehend that if my learned friend and myself had a cause pending between us and Mr. Passmore, judgment might go against us both. It appears that Mr. Bayard was the favorite; you must make concessions to him, or you will be punished, although Mr. Passmore declares he does not know that the cause is pending; his ignorance is no excuse, but on

the side of the Judges, error, mere error of opinion, is to be excused. But if the Judges are guilty, you must punish them. Let us hear what is said on that subject on a recent trial of this nature. [*Addison's Trial* 107.]—*(See Appendix, note P 4.)* Even a common farmer's ignorance is no excuse, but if he commits a contempt he must be punished, and I suppose the solderer of a tin kettle must share the same fate; but the Judges are to be excused for their ignorance. We do not pretend to understand the law; but we will take the materials they have furnished, and out of their own mouths let them be judged; but, perhaps, says the gentleman, "*tempora mutantur, et nos mutamur cum illis*,"—the times are changed and we are changed with them. These same reasons will operate now against those at your bar. But what are the examples of the bar? They thought there was too much mercy shewn. Where is that milk of human nature which flows in their breasts? Curdled, frozen, when Passmore comes into Court—Passmore, thou reptile! thou worse than the adder! thou worse than the reptile who stings his benefactor that cherished him in his bosom—come, thou ingrate, prostrate yourself at the feet of Mr. Bayard and the Judges, and let him and them put their feet upon your neck, implore their forgiveness and make acknowledgment for their great kindness to you.

That the treatment of Mr. Passmore was cruel and vindictive, let us take a view of his situation at that time. Let me lead your imagination to his chamber, there you will see his affectionate wife hanging over her dying child, lingering in the last moments of expiring nature, mingling her tears with the deathly sweat upon its face—at this moment you see an officer enter and lay hold of him, and drag him to prison; see him traversing the "mansion of his prison-house" with rapid step—at last, see him overwhelmed with anguish, sink down upon a seat in the corner of his prison, in melancholy stupor—listening to the sound of the bell.—'Tis the solemn toll inviting his neighbors to the funeral of his child—see him rise and run to the darkened window—straining his eyes to see, through the iron grates, the passing funeral——his wife, with tottering step———But, I can pursue the scene no further.———This—this touches the string where "agonies are born."———Yet the learned counsel say—he was treated with *too* much forbearance—too much *mildness*.——— Good heavens!——O ye stenographers—drop a tear on those words and blot them out forever——let it not appear on record, that, in a free country, such conduct was ever deemed as *forbearing* and *mild*.

You have heard much of precedents; but I beg you not to establish a precedent which will ruin the liberties of your country. You have been told to look at Oswald's case; I request you to look at enslaved Europe. The Bastile was not built in one day; the stones are laid one day after another; tyranny progresses

insensibly. If proceedings of this kind are sanctioned, a man, without knowing the cause of his punishment, may be torn from the bosom of his family and immured in a prison. To you we look for a remedy. To prevent a state like this, check it in its bud, for should it blossom and ripen into maturity, its evils will be irremediable.

Let us look once more to an expression of Mr. Jefferson, the man of the people. [*Jefferson's Notes*, 229.]—*(See Appendix, note S 4.)* You may expect to see other precedents growing out of that one, until all is gone. This is to me an important task, but I cannot desert the path of my duty. I sincerely deplore the necessity of instituting this prosecution; but, if they are guilty, I say that they should receive that punishment which the Constitution points out. Let me intreat you to vindicate the cause of liberty, and the rights of the citizens of Pennsylvania.

Let me adopt and apply the sentiments of the elegant Curran —"Liberty is commensurate with and inseparable from, the soil of Pennsylvania, which proclaims to the stranger and the sojourner, the moment he sets his foot upon Pennsylvania earth, that ground on which he treads is holy, and consecrated by the Genius of *UNIVERSAL EMANCIPATION*. No matter in what language his doom might have been pronounced—no matter what complexion incompatible with freedom, an Indian or an African sun may have burnt upon him;—no matter in what disasterous battle his liberty may have been cloven down—no matter with what solemnity he may have been devoted upon the altar of slavery—the first moment he touches the sacred soil of Pennsylvania, the Altar and the God sink together in the dust; his soul walks abroad in her own majesty; his body swells beyong the measure of his chains, that burst around him, and he stands redeemed, regenerated and disenthraled by the irresistable Genius of *UNIVERSAL EMANCIPATION*."—May these sentiments, expressed but figuratively of another country, be realized in Pennsylvania.

Mr. Speaker, I am about to close my observations; and I hope it is the last time it will ever be necessary for me to address you on so extremely unpleasant an occasion, and this will depend very much on your decision. Before I take my leave of you, let me put one or two questions to you. I put them to you in the presence of the House of Representatives—I put them to you in the presence of the citizens of Pennsylvania, who are anxiously waiting for your decision—I put them to you in the presence of HIM, who is the searcher of all HEARTS.—

Do you think the Judges have been guilty of a misdemeanor in office?—If you answer in the affirmative—I put this question to you—Does not justice require that they should be punished?—If you answer in the affirmative—I put this final question to you —Can you do any thing *better* than justice?—If you answer in

the negative—then, in the name of the House of Representatives, I demand justice—in the name of the people of Pennsylvania, I demand justice—in the name of injured liberty, I demand justice.

The blood of the father of Thomas Passmore, shed in the cause of freedom, cries from the ground and demands justice.——I wait for your decision—the House of Representatives wait for your decision—the citizens of Pennsylvania waits for your decision—the recording angel of heaven's high court waits for the decision, in order that he may record it.

The moments that I have occupied in addressing you, has approximated you and me to that bar of heaven before which the innocent needs no advocate, and the guilty cannot stand—where justice, pure and unmixed, never ceases to flow.

And now, Mr. Speaker, I take my leave; and may the great judge of the human heart enable you to decide with justice and firmness.

Mr. DALLAS. The part assigned to me in this business, is to take care, that all the important points should be brought fairly before this honorable court. I am sensible of my situation with that gentleman. Sir, he has considered me as belonging to the profession of a villian. To such insinuations, I shall make this single remark, that men are best known by the company they keep. He has insinuated that my arguments were those of an ideot, and yet he has over and over again, called me his "worthy friend." With a full regard to all the attention they merit, I can pass over such inconsistencies. I shall not regard the manner in which I have been treated. But as to Thomas Passmore, we never brought his character into question. It was the manager that did it. But since it is at issue we are willing to put that character to the test. I will tell the court a fact. Some time after the trial for perjury, Thomas Passmore called on me; he told me, he was endeavoring to get certificates, relative to his late trial. I do not recollect what answer I made him, but I know it was such a one as to rid me of all further importunity from him, for I did not wish to have any intercourse with the man. I will not turn inquisitor, but if you please I have it now in my power to prove that the facts charged against him are true. If Passmore chuses, I will bring a civil action and ascertain it. I now repeat my assertion, that if after this Thomas Passmore will call upon me, and agree to the proposition, and will enter into a civil suit, I will join issue with him, and pledge myself to prove him perjured. So far as respects his character, as it is given by "*my worthy friend*" the manager, I refer this honorable court to the opinion of the grand jury; and to what may be seen on the records of the bankrupt office.

Mr. RODNEY.

Mr. Speaker, I am extremely sorry that in the course of this trial any thing should have fallen from the managers or counsel for the prosecution, to injure the feelings of the opposite counsel; I equally regret that any thing should have fallen from the learned counsel for the respondents, implicating the character of Mr. Passmore; for were they well founded they would not make the cause of their clients one tittle better.

Independent of the copious evidence, both on the part of the prosecution and that of the respondents, which has been brought forward, the very elaborate argument of one of the counsel for the respondents, must have fatigued and exhausted the patience of the honorable Court, even in travelling through the rugged path of the common law, had it not been for the eloquence of the gentleman, and his interspersing it with figures and flowers, which were calculated to fascinate the ear, but not to fix the judgment.

I fear, that I cannot expect to fix the attention of the Court without presuming much on their good nature and indulgence, while I attempt to discuss a case which breaks loose upon all the rules of justice, and strikes at the vital principles of liberty. My honorable friend, the manager, has anticipated much of what I had intended to say. But in rising to discharge a reluctant and at the same time a painful duty, before a Court, dignified by the characters which compose it, the subject demands from me an undissembled acknowlegement of all those emotions which I am really alive to. When I consider the serious nature of the article of impeachment, against the chief-justice and two associate justices of the supreme Court, and reflect on the respectability of their characters; besides, having known, when I read law in Philadelphia, the chief-justice, whose head is now blanched in the service of his country, preside with great dignity on the bench; and feeling as I do in consequence of the many friendly attentions I have received from him, it would be much more congenial to my temper to defend than accuse. I must confess, that I never rose under circumstances more peculiarly embarrassing, when I observe that there are opposed to me two of the most able advocates of the bar of Pennsylvania; but when I recollect the first parental lesson, which was confirmed by the lesson of him who taught me my profession, which was at all times to do my duty, and to look that duty in the face, I cherish a hope of being able to acquit myself to the satisfaction of the honorable Court, and to that of those who had employed me; I shall therefore avoid, as much as possible, any thing that might give offence.

When I was called on by the honorable managers, the organ of the legislature of a sister-state, to aid them in supporting the cause confided to them, I felt that I could not refuse, as an independent professional man, to repair to the post assigned to me; but notwithstanding all this, it is my earnest desire to act a candid and liberal part; and I do not expect, even abandoning all the usual prejudice, to appear amiable in the unamiable office of counsel for an impeachment of this kind.

My learned friend, the counsel for the respondents, long before he concluded his lengthy arguments, said the fabric was tumbling to the ground, because he had removed the pillars: I must confess that I do not see it in the same light the gentleman has; because if I had viewed it as he has, I would have been happy, very happy, to abandon an employment, which must always be an ungraceful task. I am confident that the honorable Court, in the course of the investigation of, and in the subsequent decision which they must make on this subject, will act with dignified impartiality, and that they are far elevated above party prejudices on the one hand, and favouritism on the other; for surely, sir, this is a very interesting case, nay, it may be pronounced a very unfortunate one indeed, when I consider that the honorable and venerable objects of this prosecution have a very great stake at risk—(perhaps greater even than their lives or their liberties) their reputation. The people also have a great deposit,—they have now the preservation of their liberty depending, and they have a right to expect and demand impartial justice at your hands.

By the constitution and laws of Pennsylvania, provision is made for the punishment of that class of criminals who may become obnoxious to the laws, by the ordinary course of proceeding, by indictment; however there is a class of offenders, for which the constitution provides another mode of punishment; that is, whenever any of the judges commit an offence in office, the house of representatives, as a grand inquest, shall look into the case, and if they find matter to justify them for so doing, they shall proceed by impeachment against the offender. In this way does this prosecution come before you, who are to give judgment in the case. As such arguments have been used, as may tend to lead your attention from the main question, by wandering into the regions of fancy, I will call back your attention to the article of impeachment. The article reads in the following terms: [Here Mr. Rodney read the article of impeachment as far as to where the publication of Mr. Passmore is recited. He requested the Senate to attend to this publication as it appeared to be the platform upon which all the proceedings of the case were built. He then read the publication and the remainder of the article of impeachment.]

This article, sir, contains a charge exhibited by the house of representatives against the three judges of the supreme Court. The plea, whether they are guilty or not guilty, has been put to them, and they have answered, "not guilty." To this plea the house of representatives have replied, "that they are guilty of all and every the matters in manner and form as therein charged."

It is not my wish, now, or at any futnre time, to rouse the feelings or alarm the passions; I only wish a cool and dispassionate decision. I will attempt to draw the attention of the Court to the two general propositions into which I shall divide my argument:

First. Whether the Court possessed any power, by law and by the constitution, to act as they have done, and whether they have not committed a misdemeanor in office?

Second. Whether it be such a misdemeanor as to authorise an impeachment?

But, before I proceed to discuss the first proposition, I wish to reply to some observations of my learned friend, of counsel for the respondents. The gentleman appeared to wish to arrest the prosecution in its very treshold; I think that he said, when he was commenting on the case of Oswald, that the house of representatives were not competent to decide whether the judges had erred or not, owing to the legislature's sitting at this place, and that it was setting a precedent pregnant with more evil, than the Grecian horse ever was to the inhabitants of Troy. How can it be said, that the house of representatives are not competent to decide, because they sit in Lancaster, and, as has been said, are removed from the immediate scene of action? The gentleman might have assigned some better reason, if he could have assigned any at all for the decision of the house of representatives. Perhaps I may be mistaken in stating the gentleman's remarks; but if the gentleman did make those remarks and believed them to be well-founded, I will ask him what reason he could assign for the judges not objecting to the competency of the house of representatives; they ought to have filed something like a plea against their decision?

Even in England, from whence we draw many of our precedents, grand juries are never composed of professional men; neither in this country is there an instance of a grand jury's being made up of professional men; and yet a grand jury can return a bill ignoramus, even if endorsed by all the judges of the supreme Court. If the bill is true, the grand jury can-

not return it ignoramus without a violation of a solemn oath; but in no instance where a grand jury (although unlettered men, have life, liberty and property committed to their hands) has returned a bill ignoramus and decided for an acquittal, did a Court venture to order or take measures for a new trial upon such charge. In the present case the house of representatives, acting as a grand inquest, have decided that the judges of the supreme Court ought to be impeached. This they have done by virtue of the constitution under which they act. They are the only competent power to do it. They acted agreeably to the constitution, and I take it to be one of the fundamental principles of government that no man should be wiser than the constitution itself.

Before I proceed to my argument, permit me to call the attention of the Senate to some of the observations that have fallen from the learned counsel for the respondents. Believe me, sir, at one time I thought myself transported into a Court of justice, where I was attending the trial of Mr. Passmore; at another period, I thought I was in the Court of chancery, cloathed with powers of the most unlimited nature, within whose capacious grasp the liberty of the citizen was annihilated; at another time I fancied myself transported into a quizzical club, where, all the remark that I had to make was, that some of my friends were quizzing upon rather too serious a subject. I do not wish to treat this case with levity, it is certainly an important subject and ought to be regarded with a solemnity proportioned to its weight and moment; it is my wish to strip the case of the veil with which its injustice and deformity were endeavoured to be concealed. I would have endeavoured, if possible, to follow my learned friend, but he, with the reins flowing on the mane of his fancy, in the language of the turf, had flew the course and run without the poles; it is therefore only necessary for me to advert to some of his observations. To follow him strictly would be beyond the power of memory and understanding, unless it be such a memory and such an understanding as that gentleman possesses. My learned friend has said that the judges had, from the moment of the commencement of this prosecution in the house of representatives, kept a profound silence; that they had presented a memorial to the House of Representatives, and to the Senate; and that all they had asked was a speedy and public trial, according to the constitution and laws; and that their lips had been unsealed for that single purpose, while the press was teeming with obloquy against them. But on the other hand, it appears that the conversations in private circles, in taverns, and the publications in newspapers, not only against the late and present House of Representatives, but even against this Court, has more than balanced the oblo-

quy, and I think at least they are partly equipoised. But as to things of this kind, they must occur in a free country like this; it is the alloy of liberty, and we must agree to take it with this alloy or go without it; and I do not see the alarming consequences that could result from a petty newspaper paragraph, that the learned counsel for the respondents did.

The sentiments, that I entertain of our profession are similar to those expressed by the learned counsel and by lord Bolingbroke; the profession of the law is in its purity the noblest, in its debasement, the worst in society. But before a tribunal like this, chosen without influence, without bias, chosen by the people themselves, who are the sovereign power, retaining the fee simple in their own hands, I have no apprehensions of the profession of the law suffering from prejudice. The profession of the law, must always be an honorable profession; I will go further, it is a democratic one too; because it will raise a poor man to an equality with the richest; and can put the poorest member of society upon a level with the rich nabob, who lays by his plum a year. I am far from entertaining any suspicion of the motives of those gentlemen who have been applied to and have declined serving the managers on this occasion. I think the learned counsel has stated that it was from motives of peculiar delicacy they had refused to serve, which I implicitly credit. The learned counsel seems not to have been pleased at the honorable manager's intimating to the Court, that they ought to enquire into the source from which their power has sprung. But, if the learned counsel had taken the whole and not an abstract part, he would have had no reason to complain. I believe the Court to be perfectly impartial; but if they are not wholly so, our motives are not to make them partial, but to enable them to judge calmly and deliberately, to act a candid and honorable part; to recollect that they have one day to give an account of their conduct in discharging their duty on this and every occasion. And is there in all this, any attempt to prejudice the Court?

The learned counsel for the defendants, has remarked upon one of the observations of the manager, and has been pleased to say, that he appeared to have disregarded the slippery weather, and to have mounted on stilts; I do not think this is the case, but in my humble opinion, my learned friend rather appears to be mounted on skates, with which he seems to think he can make what speed or flourish or carve, whatever figures he pleases. The observation, which the counsel for the respondents is pleased to make, respecting the intrigue for the office of bank director, or the subject of a governor, as far as I can see, or as far as my mind will enable me to

judge, is quite extraneous and entirely foreign to the case now in discussion. The counsel for the respondents has said, that this case has been brought forward by an obscure individual, but he will recollect the second *Magna Charta* in England was brought forward through the means of an obscure individual; he will recollect that it was owing to one Jenkins, that the second *Magna Charta* was obtained; he had made a flowery speech at Guildhall, to the populace, in consequence of which he was immediately taken up and confined in prison; at length it excited the attention of the House of Commons, who investigated the case, and in consequence of the oppression that had been exercised towards this individual, the famous *Habeas Corpus* act was passed, containing a clause that forever prohibited its repeal; though Parliament may suspend its operation at pleasure, during times of public danger; and I believe, during the late war, it has been suspended for four or five years. The House of Representatives deserve great credit for their conduct in thus attempting to redress the injuries of a poor and obscure individual; they listened to the complaint, they examined into the case, they called for testimony, and after a rigid scrutiny adopted the article of impeachment. But what does all this signify, on the part of the House of Representatives, unless there is firmness enough in the Senate to act with independence, and to do justice; which will reflect credit on themselves and on the people, and evince that it was not by a volume of eloquence and declamation, but by facts that they were to be influenced. I regret that my worthy friend has rode rough shod over the character of this poor man, when it is the act of the House of Representatives, and not his. If by blackening his reputation by the breath of calumny this accusation can be blown to the wind, the House of Representatives have decided to very little effect or purpose. It has been said he must have motives—surely it would not put a penny in his pocket; on the contrary it has cost him a considerable sum—he certainly could not look for one of their seats—he could not look so high, as he is not a professional character. There can be then no interested object in view. But, it seems that he has visions by day, and dreams that sadly disturb him at night. Surely when he was sent to jail for thirty days, it was not a dream—not a mere thing of fancy—and his castle in the air proved to be a place in the debtor's apartment. It has been urged as a matter of merit, that he was accommodated with the same apartment Mr. Duane had been confined in; but what is that to the purpose? I fear it only goes to prove that if contempts are so easily established, numerous apartments would be provided, sufficient to contain every independent printer, in the United States, over the grated door of which would be engraved,

"The American Bastile." Such will be the consequence, if this doctrine of contempts is conceded in the extent contended for. I beg the Speaker to recollect that I am not on any account objecting to any testimony, or to any of the observations of the learned counsel. Every thing on their part has been sufficiently liberal. I wish this trial to be conducted in the most public manner; I wish that the doors, nay even the windows may be thrown open, to afford every one an opportunity of hearing and seeing the proceedings.

A great deal of testimony has been given on the subject of the reference, I shall endeavour to give the Senate a short sketch, and if the portrait should be defective, or if its lights and shades should be too highly colored, I request it may not be attributed to design. I am not unaware of the abilities of the counsel who has spoken before me; he has with so much skill and eloquence interwove the lights and shades in his statement of the case, that it really requires a glass to separate the applicable from the inapplicable; that glass this Court fortunately possess.

I proceed to give a brief history of this business, so far as it relates to the reference; it seems that some time in the year 1801, Thomas Passmore had a policy of insurance on the brig Minerva; this brig in going down the river ran foul of another vessel, and received an injury which obliged her to put into a port in New-Brunswick; a protest by the captain was made and a survey held, in order to ascertain what repairs were requisite, before she could proceed on her intended voyage; the amount exceeded fifty per cent. of the insurance, and of course, being more than one half, gave the party the right of abandoning the vessel to the underwriters. The papers were lodged with the broker, and after the usual period, he also lodged in the office a letter of abandonment.

It seems if the vessel is not sea-worthy at the time of her sailing, the policy is good for nothing, and it was on this ground, it appears, that the broker considered that the underwriters ought not to pay. Messrs. Pettit and Bayard, it appears, were the very first to object to paying the loss. How was this dispute to be settled? After about seven months being spent in fruitless applications on the part of Mr. Passmore, an agreement was entered into between him and Messrs. Pettit and Bayard, to refer the matters in variance to referees, because they were more likely to put a speedy conclusion to the dispute.

A great deal of credit has been given to Messrs. Pettit and Bayard for so doing; for, says the learned counsel for the

respondents, they might have told him at that time, "Thomas Passmore take your course, probably you may recover against us, but we will not pay until after a legal trial." But I beg leave to remind you gentlemen, of the facts, and appeal to you if it is not the case; that it is exactly where it would have been, if he had instituted a suit in the first instance, instead of proceeding by reference.

However the agreement was entered into by Messrs. Pettit and Bayard, and was signed by most of the underwriters, to refer this matter to two persons. He goes with this agreement to the office, and is told, it seems by his own testimony, that this cannot be entered, because it wants the name of an attorney. He then applied to Mr. Sampson Levy, a gentleman of understanding and correct legal knowledge; and he has stated, that he told Mr. Passmore, that "this will not do, it is no more than a mere blank paper; it contains no power to choose an umpire, in case of disagreement; there is no *ex parte* rule that has been signed by Pettit and Bayard." It will appear by the origin of the agreement to refer that it was intended that the referees should be authorised to choose an umpire in case of disagreement. How was this to be remedied? It was by drawing up a new agreement, conformably to the instrument Mr. Passmore had produced, only giving a power to the referees to choose an umpire. Mr. Levy appears to have recollected with accuracy, when he says he advised Passmore, or that Passmore told him he would procure the signatures of Pettit and Bayard. It appears that a rule to refer requires the name of some attorney to enter it in the office, and in this instance Mr. Levy signed his name as attorney for Mr. Passmore. Mr. Passmore enters the rule of reference, without having obtained the signatures of Messrs. Pettit and Bayard; I will suppose this was a mistake of Mr. Passmore, for his information must have told him that to secure his own interest properly, he ought to have got it signed by them; as the original, in case of disagreement, did not authorise Mr. Henry and Mr. Pearce to choose an umpire.

The referees meet on the 13th of July, and enter into an investigation of the business; Mr. Bayard and Mr. Passmore are there; Mr. Passmore states his case and urges the payment of his claim—Mr. Bayard says, gentlemen you are all wrong, this vessel was not sea-worthy, and unless a vessel is sea-worthy at the time of her sailing, the underwriters are not liable; and concludes that from existing circumstances they ought not to pay. The referees hear their several stories and adjourn. Mr. Bayard was present at the time of this adjournment. At the next meeting of the referees, which was on the 17th, Mr. Bayard does not attend, although he

was bound to know the time of meeting without further notice; as he actually signed the paper with Mr. Henry's name in it; and in my opinion it was enough that these gentlemen consented to serve without putting themselves to the additional trouble of notifying the parties; and if Mr. Bayard did not choose to attend, it cannot be said their meeting was held to take advantage of his absence.

At the second meeting of the arbitrators, Mr. Passmore was there, but Mr. Bayard was not. When the referees proceeded to consider the case, they observed that Mr. Passmore had five thousand dollars at stake, and Mr. Bayard only five hundred dollars, and that different representations of the state of the vessel had been entertained by the other underwriters, from those entertained by Messrs. Pettit and Bayard, at the time of subscribing the policy of insurance; not only Mr. Henry but Mr. Pearce agreed at once, that Mr. Passmore should not run the risk of losing five thousand dollars, when Messrs. Pettit and Bayard only risked five hundred dollars. From a bare examination of the testimony, it will appear, that neither Mr. Henry nor Mr. Pearce alone advised the measure, they both united in the representation; for, said they, as we might find a verdict in your favor in one case and not in the other, and we think that the decision in this case may be binding on you in all, we advise you to obtain another agreement, to be signed by all the underwriters, except Messrs. Pettit and Bayard.

In consequence of this advice, Mr. Passmore applied again to Mr. Levy, who drew up another agreement for these underwriters to sign. By the by, my learned friend has made some observations on the zeal and industry of Mr. Passmore, in this business; we are not in the least surprized at it, as he naturally was attentive to his own interest, for which he is censured by the learned counsel, while Mr. Bayard is applauded for his ingenuity in delaying a decision. Mr. Bayard certainly cannot pretend he was surprized at the referees meeting and proceeding to business without his being present; he knew of the next meeting; if he wished them not to proceed without being present he should have sent some excuse for wishing a postponement, that his family was ill or out of town, a plea of pressing business, or some other reasonable excuse: but as he did not do this, and a party, if they do not please, are not bound to attend, the referees proceeded without him.

Well, Mr. S. Levy relates in corroboration that he drew up this second agreement: They had a third meeting, at which they progressed further in the business; I believe it

was at this meeting that some difference took place between Mr. Pearce and Mr. Henry; no, I rather apprehend it was at the fourth meeting; I will refer to my notes, in order to correct myself if I am mistaken. It was at the third meeting, that Mr. Bayard discovering a difference of opinion between the referees, was the first to suggest that an umpire should be chosen. Mr. Passmore swears that he objected to it, and wished the referees to decide without calling in an umpire; this Mr. Henry, also on oath, corroborates, and although the learned counsel has laid much stress on the validity of Mr. Passmore's testimony, yet that of Mr. Henry has not been regarded as invalid, although he has declared he considered himself as a volunteer in this business; and I am sure that any other man, if he had known the trouble he must encounter, would have been very reluctant to have engaged in the service. Here are two witnesses swearing positively to a fact; and remember the words of my worthy friend, the learned counsel, that one affirmative is worth, and his testimony will countervail, that of ninety-nine negative witnesses. Notwithstanding Mr. Passmore's objections to the measure the umpire is chosen. He that made all the noise about the decision, was the very first man to propose the choice of an umpire. But, oh, Mr. Bayard had not the choice of the umpire; does it appear that Mr. Passmore had any influence or agency in the appointment of this umpire, according to the plan pointed out by Mr. Bayard himself. The refereçs nominated Mr. Ralston and Mr. Haslett, they both agreed that the two gentlemen were equally unexceptionable. Mr. Ralston was first chosen, but he declined, and Mr. Haslett was then appointed and agreed to serve. The umpire meets the referees. What does Mr. Bayard do? he opens the door, and he is told, "Walk in, sir, we are on your business;" he comes into the room, as he says, to look for Mr. Pearce, (and I believe what he says to be true, for I have the pleasure of his personal acquaintance) and takes his seat with the referees and umpire. The learned counsel has told us that acts speak louder than words; and so they do. It appears that by this time the referees had stated the nature of the case to the umpire; and Mr. Haslett says, that it was very soon after he came into the room that Mr. Bayard came in also, and took his seat at the table; he and Mr. Passmore undertook to argue their cases; Mr. Passmore claiming the insurance money, and Mr. Bayard denying the legality of the claim. Oh, but then, says the learned counsel, Mr. Bayard did not see particular papers! All the papers were then lying on the table; what other papers could he, suppose were necessary, and had not been produced? Certainly Mr. Bayard is not blind, nor is he an infant? There were the papers for him to scrutinize them if he chose, and he had a full and fair op-

portunity to see every paper. Mr. Bayard, it is true, did not examine whether there were any objections to be made to them before the referees.

I do not wish to impute any improper motive to Mr. Bayard, but I do not think he went so far as he might have done; he ought to have first examined the papers before the referees, and if he had found any deficiency, he could then with propriety have requested time till it was procured. Mr. Haslett, after resting a night, came forward to correct any idea that might have been erroneous on the day before; and it shews the native honesty of the man and the goodness of his heart. Mr. Haslett has stated that Mr. Bayard did go to a full length in support of his cause, that he certainly heard him on the subject, and took all the papers with him to assist him in making up his mind. But, says Mr. Bayard, I want to see the bills—I want to see how many planks, how many timbers have been used in her repairs; if she has been butt-boarded; wait till this arrives; I will leave it to you, if you undertake to get it for me; or I will get it myself. This request ought to have been made seven or eight months ago. Well, where was this to be got? At Shelburne; about a weeks journey by land, and I believe, about ten or twelve days sail from Philadelphia. Well but they had sufficient time to have procured it, after this case had been hung up by the eye-lids so long, if they had thought it was serviceable to them. Well, what does Mr. Haslett tell you? I asked him, Mr. Haslett when you adjourned from this to the next meeting, did you adjourn to meet again to hear further statements, or did you adjourn merely to give you an opportunity to make up your mind? His answer was, that was the received idea with which they adjourned. The only object of the reference was to decide and draw up a report. Mr. Haslett finds that Mr. Henry entertains one opinion and Mr. Pearce another; the scales are even balanced, and he must decide. Mr. Pearce who was to my knowledge bred a lawyer, and practised a considerable time, produced several authorities, particularly the Mill's frigate, as the *Magna Charta* of the laws of insurance. But, says Mr. Haslett, like a very honorable man, I wish to decide honestly; he goes home, pores over Park on insurance, and after deliberating, writes two letters; one of the letters is sent to Mr. Henry, and a similar one to Mr. Pearce; here he states the principles on which he goes. After all this consideration and reflection Mr. Haslett makes up his mind with as much attention as if he had been a counsellor and received a fee for so doing, and informs the referees of it; Mr. Henry and Mr. Haslett draw up the award, and state his being appointed umpire by consent of parties—I will read the award, "We the subscri-

bers, (William Haslett, being appointed by Messrs. Henry and Pearce) after a full and fair investigation of the subject—do award for the plaintiff in the above case, four hundred and ninety dollars, with interest.

HUGH HENRY,
WILLIAM HASLETT."

Now, may it please this honorable Court, we will pause at this stage of the business. I admit that if the rule of reference had been entered agreably to this first agreement, there could have been no appearance of authority to choose an umpire; but I contend that Mr. Bayard should not have mentioned to the referees, to choose an umpire; that he should not have acted before them. What could be the decision of this Court on the case of Messrs. Pettit and Bayard and Mr. Passmore; let me appeal to your plain common sense, to your native integrity and honest judgments. Was there any thing reduced to writing that authorised this proceeding? Words may mean any thing, but actions speak fairly and loudly the intention of the party. There was Mr. Bayard disputing the case with the plaintiff, and after a decision objects to the authority of the umpire. "Look at the rule; it is all wrong; this man has no right to decide; look at the rule of reference; I did not choose an umpire." "Well but did not you propose the choice of, and act before the umpire?" "But look at the record, see whether in all my agreement you can find an umpire? My agreement is to be tested by the record, not by my actions."

I agree with my learned friend, that the Court are only answerable for the case as it appeared before them. But I say, with this evidence staring them in the face, what should a Court of equity have done? Why they should have said, here is your meeting the referees with the umpire; from this it appears you might have consented to the measure, and consent takes away error. Let us see, the learned counsel has produced a case from Dallas' reports, different from this.

Adjourned 'till 10 o'clock to-morrow morning.

THURSDAY, January 22, 1805.

Mr. RODNEY, in continuation.

When this Court adjourned yesterday, I had laid my hands on the book containing the case cited by the counsel for the defendants. I beg leave before I proceed in the discussion

of the case, to draw the attention of the Senate to a point which I have left a considerable way behind in the argument.

The Court will recollect that in the course of my argument yesterday, that I adverted to the original paper, I adverted also to a rule which I thought was drawn for the purpose of carrying this agreement into effect, not as Mr. Levy said, to give body and form to the agreement. I would not at the peril of my life, knowingly give a wrong statement of this case. But even if I did not state it correctly, I think that every member of the Court, that the learned counsel will be able to correct me. If the statement I give is correct, surely Mr. Levy must have adverted to this agreement to cancel the former, and yet, on the face of that paper, it appears, that it could not have been in the contemplation of Mr. Levy that Mr. Bayard and the other underwriters should sign it. Mr. Passmore received advice from Mr. Burd or one of his clerks, that as the agreement was not signed by an attorney, it would be necessary to obtain the signature of one to it, before it could be entered in the office.

The case which was cited, by the learned counsel, is from [1 *Dal. Repts.* 293. *Tetter* vs. *Rapesnyder*. See Appendix, note, I. 3.] Now what was the state of this case. Here the parties agree to refer to three men, which appears was a mistake; disputed if only two of the referees had met, when the original agreement required the three to meet, though it does not follow that the three must sign the report; if two only had met, and the third attended after a decision, and they had refused a participation, then there would have been some thing equitable in the objection. This case is very nearly like the case which is to be found in Addison's Reports. I shall not read this case, as I do not wish to add to the mountain of authorities already heaped upon you. I think there is a case which was referred to four or five times; its substance is this; one of the referees declined, and this occurred after the rule had been taken out; the one who did not agree, refused to sign the report; when that report was returned into the office, objections were made to its validity; the Court held it to be good, although the agreement had been deviated from, as the party objecting had acted before the referee. Here is a question, whether an agreement in writing or the solemn and voluntary acts of a man are the strongest evidence.

I know not the use of writing, unless it be to bind the parties; but if they agree to deviate in a particular part from the provisions of an agreement, the act of agreeing destroys the effect of that point of the writing. This award is returned

to the Court; and I should consider it, by the actions of Mr. Bayard, and his assent expressed by his proposing the choosing of an umpire, as obligatory on him. Some time after, this report is filed in the office of the prothonotary; in a short time after it was filed, I believe the next day, Mr. Passmore gets a transcript of the award and goes to the office of the insurance broker, Mr. Shoemaker, to have an order drawn for the payment of their respective sums; he it appears has been blamed for not seeking to encrease the difficulties of the dispute. The Senate will please to carry this fact in their recollection; that the other underwriters agreed that the original referees, in case they did not agree should choose an umpire. Will we then say, will any one think that it was likely that he should go first to Pettit and Bayard; he was apprehensive that if any of the underwriters should be disposed to cavil at the award it probably would be Pettit and Bayard, he went first to those who were most likely to pay, not only to secure his own interest, but he also might reasonably expect that the example of the other underwriters in signing the order, would operate as an inducement on the minds of Messrs. Pettit and Bayard. It is a common case that occurs every day. If any man sustains a loss on a case of underwriting, some pay immediately and others will not pay until compelled by due course of law. Had not Lyle the power to say, I will not pay till I see Pettit and Bayard's names to the order. But he relied on the insurance broker; so there was no fault on the part of Mr. Passmore. If the insurance broker, equally the agent of both parties, drew the papers, he must have done it from an expectation that the award would not be questioned, for every body that saw it readily gave credit to it. It appears that the money was paid by those people and yet Messrs. Pettit and Bayard refused.

Let me now draw the attention of the Senate to the original propositions, I mentioned some time since.

First. Whether the Court had any power by law and by the constitution, to act as they had done, and had not made themselves the objects of an impeachment?

Second. Whether it be such a misdemeanor as to authorise an impeachment?

I shall contend that they were guilty of a misdemeanor in office. I know that in doing this I shall have to examine into the conduct of high and dignified characters for whom I entertain great respect; particularly of one whose memory shall be ever dear to me, while a sense of gratitude remains within the unbroken urn of my heart.

My honorable and worthy friend will recollect that Lord Mansfield, one of the greatest luminaries of the law that ever came on the bench, succeeded in establishing what many consider a direct innovation of the law on libels. There were many independent men of the bar, at the head of whom was Mr. Erskine who opposed the torrent, but without effect. The dean of St. Asaph, brother-in-law of the celebrated Sir William Jones, was indicted and punished for publishing in Wales, what Jones had published in England. On that occasion Mr. Erskine had to contend with Mr. Buller; who told him he had nothing to do with the law, he must confine himself to the fact of publication; and he told the jury if the fact of publication is proved or acknowledged you must say guilty, and if guilty the Court will determine the point of law. Although gentlemen may be surprised to hear the liberty of the press being restricted in this country, yet in Europe, and particularly in England, it is a known maxim, "*that the greater the truth the greater the libel.*" Though the man may be able to prove the truth of his assertion it does not avail him; nay it encreases the offence. Mr. Erskine resisted this doctrine, of allowing the jury only to determine the fact and not the law; but was overruled. When the jury returned into Court they pronounced a verdict of acquittal on the law; Buller said, we cannot receive that verdict. I believe there was a kind of compromise entered into between the bar and judge Buller. When this cause came before Lord Mansfield, who had come up to the King's Bench, Mr. Erskine moved for a new trial, but Lord Mansfield confirmed the decision. The Earl of Cambden resisted this innovation. It was not long after this doctrine had received the countenance of the Court and bar, that Mr. Fox brought into the House of Commons his famous "Libel Bill," which passed and was sent to the House of Lords, but the bench of judges were opposed to a bill of that description; yet, notwithstanding their opposition it was passed, and received the royal assent. Let us now advert to what Mr. Erskine says, in his defence of Paine, who was prosecuted for publishing "The Rights of Man." *See trial of Thomas Paine.*

But, sir, there is another case which bears more particularly on the present case than that. I allude to the writs which were placed in the power of the Privy Council, known more particularly by the name of general warrants. These had been issued by the minister on general occasions time out of mind, and continued to be followed in 1688, so that even that æra of British history, the revolution, did not put an end to the practice, nor was its legality questioned, until the case of Mr. Wilkes, the writer of the North Briton, occurred; when Lord Halifix then the premier, issued a general warrant for the purpose of arresting the printer and publisher; this was done,

and afterwards the printer and publisher brought an action against the persons who had arrested them, which was tried before Lord Mansfield, and who gave a decision in favor of the prosecutors: And Lord Cambden gave his sentiments against these innovations; for the last time he appeared in Parliament was in order to oppose the Court-doctrine in this case and in the case of libels generally. With this statement let me call the attention of the Court to the case itself. 1 *Blackstone's Reports*, 555. Here the Court will see that I have a case before my eyes, in which it was decided that issuing these warrants was an illegal practice; this decision is supported by the opinion of one of the judges, judge Yeates, a sound lawyer and an upright judge, who has said, that if the practice had existed from the foundation of Rome itself, the precedent would not be good.

I am very certain that, prior to the revolution, the learned counsel for the defendants has not shewn one instance of the Court's exercising the power of issuing attachments for constructive contempts. One ground upon which they rely is, that the Courts of justice inherently possess this right, and that without this right it is impossible they can exist. If this power is necessary to their existence, it must be inherent, upon the principles of the constitution, and delegated to them by that instrument. If the constitution gave that power when it erected the Courts of justice, or if by that act it gave them that power, then the legislature have no power over it. This is certainly a very important point, and if conceded, would sanction a doctrine dangerous if not destructive to the liberty of the citizen, and I trust the legislature of Pennsylvania will never consent to establish it.

The case now under discussion, is a case of a criminal nature, and not in the least resembling the process of attachment after subpœna; this does not depend upon a solitary case in chief-justice Kinsey, for such has been the practice to issue attachments to compel the attendance of witnesses time immemorial. It does not depend on the process of giving notice in the nature of attachments for not issuing an award. This Court must not suffer themselves to be led away by the mere sound of terms, as many words mean one thing and seem to express another. A person not resident, upon a foreign attachment issuing against him, his property may be seized and disposed of without any civil process. Therefore the process of attachment for contempt is not a civil, but a criminal case, and nothing more or less than a case of a libel. But the gentleman has not produced a solitary instance to shew that attachments for libels are warranted by any act of assembly.

The gentleman asserts that this doctrine of attachment is authorised by the constitution. I venture to assert that it is not; for in case the power was either conferred by the constitution or laws, or conceded by this Court, in the extent contended for, it would go to destroy the freedom of the press and shackle the liberty of opinion; and might ultimately lead to a greater assumption of power than was formerly vested in that dreadful engine of despotism, a Court of Star Chamber. [4 *Blackstone.—See Appendix.*] The gentleman says this writ is to be looked on rather as a civil process, and though carried on in the name of the king is for the benefit of the injured individual; he might as well say that a common *capias* could take effect upon a freehold. [reads] If it were a criminal case a general act of pardon would discharge the person; but the act of pardon does not relieve the contempt of Court as to technical import. [reads] It appears then that this publication must be about a cause then depending in judgment, according to the statement of the counsel for the respondents, and according to the impression on their minds, and my idea of the Pennsylvania practice of contempts. [reads] According to this book, it being the privilege of the accused to ask for interrogatories, it is the duty of the prosecutor to offer them in the nature of a charge. In the fourth volume Irish term reports, Lord Elsford undertakes to state the doctrine differently; but we will agree that the rules of practice in these Courts are such as are laid down by the learned counsel for the respondents. Now what kind of a trial is this, to be had in a case merely criminal? Here is a case against a free citizen, of a free soil, brought forward on the *ex parte* affidavit of a man who may be heated by passion and feel himself interested in the prosecution. He is not confronted with his accuser, face to face; 'tis true he may swear to the contrary, at the risk of being perjured; but if he does not, he must be convicted. These *ex parte* affidavits are sworn to by an interested individual, and whose face is never confronted with that of the accused party, and if it was it would be of no use to him—it would be no better than a picture. Well, if sufficient ground appears to suppose a contempt has been committed, the attachment issues—What must the accused party do?—all that he can do or say is, "I'll have interrogatories put to me;" there is no other way by which he can exculpate himself, than on oath; and then if he can swear stronger than those who have swore before and deny all the charges, and does so, then he is acquitted.

Mr. DALLAS. My learned friend is so much mistaken in the practice of Pennsylvania, that I am obliged to beg the indulgence of the Court while I explain. Upon the rule to

shew cause being moved for, the affidavit of the prosecutor is filed; but upon the return of that rule, the *ex parte* affidavit must be made in open Court, in presence of the party accused, and proof must be made face to face, but if he does not require such examination, or confesses the contempt, there is no necessity for such confrontation. The learned gentleman is totally mistaken with regard to the practice; for upon the return of the rule he has as much of the benefit of examining witnesses face to face as if he was tried before a jury.

MR. RODNEY. I am very much obliged to the gentleman for correcting me; and really it was not wonderful that I should, from hearing the great varicty of cases, be mistaken. But still by the practice as stated by the learned counsel, the party is robbed of that armor with which the law encircles every man; in common cases he has the benefit of a hearing on the case by a grand jury, and when he comes on his trial he has a further benefit of a petit jury, and even if a grand jury had cognizance of the case and were to return the bill a true bill, it is uncertain if the pettit jury would convict him of it; but in this case he is stripped of his buckler and his shield. Here let me remark that if the constitution grants this power to the Courts, there must be an exception or reservation in its favor, and it is the duty of the opposing counsel to lay their hands to the laboring oar and point it out; they must establish that this is a case in which the party is not entitled to a trial by jury. But let me return to my argument, and see whether the Courts possess this right inherently. I recollect that when the sedition law was brought forward, the burden of the song was that the government could not possibly go on, and that they could not exist, where they did not restrain the numerous publications. To be sure when the opponents to that law stated that it was abridging if not destroying the liberty of the press; the friends of the bill said they were not going to abridge the freedom of the press, but merely to check its licentiousness; and argued, that by punishing the licentiousness they would preserve the liberty of the press. These arguments were but too successful, for the bill was passed, and I believe the paper-walls with which the then administration had entrenched themselves, was the instrument of their destruction. Yet, notwithstanding all this unbridled licentiousness of the press, have we seen another administration of the government going on extremely well without this law; and this mode of reasoning will apply to the doctrine of contempts. The sedition law which then passed, we will say was not carried by the unanimous voice of Congress, but it certainly was passed by a large majority of the representatives of the

free citizens; we will grant it was inconsistent with the letter and spirit of the constitution—that it was a violation of the constitution. But, sir, if the Courts of justice cannot exist in Pennsylvania without this power, how comes it they can exist elsewhere, without ever claiming its exercise. I believe the constitution of Delaware is nearly similar to that of Pennsylvania; there are a number of trials, some of a political nature, in which the press has teemed with invective, and yet I never heard of a proceeding of this nature; I recollect well once being consulted on a case of this kind, in order to bring the party before the Court; but, I am only expressing my honest sentiments, when I say, that I really thought that such a proceeding could not be warranted. The learned counsel has referred to the State of Connecticut; I believe Connecticut must have as much of the common law, as any State in the Union; and their constitution, if it may be so called, is the oldest of any of the States, as they are still governed by their original charter. Of the organization and powers of their Courts, Mr. Swift treats in his Connecticut Laws. [2 *vol.* 374.] Now the Courts in Connecticut have existed as long as those in Pennsylvania; and if they cannot exist here without this power, as we were told by the learned counsel, how can they exist in other States. What must be matter of surprise, is that I believe the gentleman, notwithstanding his diligence and his having scrutinized the law library, and ransacked and rummaged the volumes, and perhaps turned them over leaf by leaf, yet he has not I believe, produced a single instance in which a person has been proceeded against for merely writing. Nay, further, I believe the gentleman, within the last half century, cannot produce even a law case from Burrows or any other elementary writer, in which a party prosecuted for writing is not entitled to a trial by jury. I well recollect that Mr. Erskine remarks, how "the press teemed with libels of Thomas Paine, amidst all the blaze of popular resentment he said." Your Lordship knows that I would not have attempted to get you to postpone this trial for one moment, but your Lordship well knows that without a trial by jury, having the great stake of personal liberty at hazard, being had by an impartial and unbiassed jury, the whole proceeding is nothing more than a solemn mockery of one of our most inestimable privileges." Even in the House of Commons, and we are told that such is the capacious grasp of privilege of that body, that no judicial power dare call it into question, and no subject dare enquire into it. The case was this; a pamphlet was written against the House of Commons, before which body Warren Hastings was impeached, and it related to his case. Did the House of Commons immediately issue an attachment and punish the libeller for a contempt? No. They directed the Attorney-

General to prosecute him, which he did; and as Mr. Erskine observes, it was for the single object of arresting the public opinion and to keep the matter in suspence; and on the trial the jury acquitted Stockdale, the printer, who if he had been brought before the Commons, would not have been acquitted; I do say, that if he had been brought before them he would have been instantaneously convicted. Therefore we have seen even the British House of Commons relinquish proceeding in a summany way; they gave him a trial, and did not strip him of the necessary security of a trial by jury.

While I am on this subject, let me remark that I do not apprehend that danger from newspaper pnblications which the learned counsel for the respondents appears to do. Here was a case directed by the House of Commons to be prosecuted by indictment, under the weight of authority of undefined privliege. The French revolution had given birth to numerous societies; these associations excited suspicion in the government, and lest England should become the theatre of the bloody scenes which they saw were then acting in France, they endeavoured to trace out with all their spies and informers, the object and, leaders of these societies; the minister brought the business before the House of Commons, who appointed a secret committee. An elaborate report was afterwards published in which the parties were in fact prejudged. Their views were declared to be hostile to the country and the life of the king. That report was in the hands of every body; but with all the prejudice that it was intended to promote; the parties charged were cleared by a special tribunal appointed to try them. They were acquitted notwithstanding all the influence of the House of Lords and House of Commons being exerted against them. When Hardy and Horne Tooke came before the jury, the jury were not to be led away by ministerial or legislative influence; I believe they first acquitted Mr. Hardy, then Mr. Horne Tooke. The trials of Thelwal and the others were given up. Here we preceive that the danger from publications is not so great as the gentleman imagines. I beg not to be considered as standing up as the champion of libellers; I have myself felt their shafts, but they have never given me a pang. I have consigned them and their libels to their merited contempt.

This danger then, is not to be apprehended so much as my learned friend the counsel for the respondents, has intimated; for I believe it had no effect in the case of Fries; it is true he was condemned, but if the paper had not been published, he would have been condemned, for I do not suppose that any thing appeared in the publication that could

have weighed a feather in the scale, either with the Court, the jury or the counsel. It is a very specious and plausible mode of reasoning when they tell you that Courts cannot exist without this summary authority. Will this Court sanction such a mode of reasoning, when it does not arise from logical poverty, or ethical penury? To say that because they are a Court they must possess this power, is arguing, to use the expression of my learned friend, in a circle indeed. If you once sanction this principle there is no knowing to what extent this power may be carried; for a single grain of gold, in consequence of its mallability may be beaten out to a prodigious surface indeed; and upon the same principle this power may be carried so far as to become dangerous to the liberties and rights of the people. The gentleman himself has certainly produced authority enough to shew the danger of sanctioning this power according to the English measure, which been cut out for answering the purposes of repressing the ardor of freedom, and rendering a corrupt government feared though it may not be respected.

But while I am on this subject let me advert to one case in the Federal Court, and that is the case where Mr. Duane was punished in this manner. I am sure there are some points in this case on which others will think differently from myself, because they are axioms in politics; but I suppose there is no doubt but every member of this Court will agree, that the Senate and House of Representatives, have not the right to pass sedition laws; nay, if they even passed one and it received the sanction of the President, it is without authority given by the constitution. We will suppose this law does pass, and in this way, notwithstanding it has received the sanction of the legislative and executive branches of the government, it will not be agreeable to the constitution, and of course not the law of the land. The legislature have no power over libels. You attempt to derive this power from the principle of its being inherent in the legislature; notwithstanding this you let us have a grand jury and a petit jury in all cases. But we say you have no right to pass this law; the constitution gives you no power to do it; yet the gentleman will say that the Court have this power of punishing constructive contempts in a summary way, inherently—that it is an indispensable appendage. The combination of the legislative, executive and judicial branches of government; all these powers combined could not punish in a summary manner; for in cases of libel, a man is entitled to the privilege of his trial by jury. You may call it a contempt, call it an offence of whatever name you please it is no matter; if it is a libel you cannot proceed in this summary way. It is true you say that the Congress have no

power to pass sedition laws, and if they do, it is a violation of the constitution; but yet when the Court proceeded in this way it was all constitutional. I think I may venture to say that the legislature, that the united force of the government cannot punish in this summary way; and if so the inference must follow as necessary as any corollary demonstrated from a principle in Euclid, that any single branch cannot have the power of exercising this summary process. How did the judges of the district Court get over this? Sir, I will not read the arguments in this case. They are lengthy. Permit me to observe to you that some judges although they been honored with the ermine, have also been clothed with some of that spirit, which unfortunately does occur in some cases, of a party nature; we can see when their authority is called into question how easily they get over objections. *See Wallace's Reports, page* 98. When their power is questioned we find they appeal to the act of Congress; but what if Congress have not the right by the constitution to vest such powers in the Courts? and I believe they cannot shew me a part of the constitution where those principles are recognized. They can only answer that they find themselves in possession of the power, and ought to possess it by inference. The chief judge of the district Court I am personally acquainted with. He is a gentleman of the most amiable manners; but, sir, Mr. Tilghman may have been mistaken as other men have been. You perceive, sir, how readily the Court applies to the act of Congress, and how zealously they hunt for authority. But they never look into the constitution. Truth, sir, requires no labour. The step is plain and regular. But error can hop, and skip and hop upon assertion, which it pleases to call conclusion. My opinion is that the Supreme Court of Pennsylvania have no authority by the constitution, or any constitutional law to exercise the power contended for. The gentlemen think otherwise, and believe the Court to be possessed not only of this but of all other powers. If however my conclusion is correct, the fabrick I think I have raised to this cause can't possibly be demolished. I proceed to another ground which is that of the common law, as it is said they possess this power from the common law; but I shall not enter into a disquisition as to the origin or nature of society; I shall not enquire whether William Penn expected to find a Solon or Lycurgus, who had a system of laws prepared for him, nor as Cortes with the Mexicans to find a Montezuma and an organized city.

I shall not contest the practice of Pennsylvania, except as to this case, and the extention of the common law. I cannot consider the common law as a system so perfect as not to admit of amendment, nor yet can I pronounce the eulo-

gium on it that the learned counsel for the respondents has—for I think that the shirt of Hercules himself would not be worse to the people than a full suit of the common law; I mean the common law with all the feudal reservations. [Here Mr. Rodney read some extracts from the case of William Blount, to shew that the counsel for the respondents, when defending Mr. Blount, before the Senate of the United States, had expressed different sentiments from those which he had used on the present occasion, relative to the distinctions between civil and criminal proceedings.] Many cases have been cited from English authorities; I do not wish to say a word against the administration of justice in England, but I cannot subscribe to the opinion that their judiciary is the best that is known or can be framed. I believe that in cases between man and man, the law is justly administered, but it is still attended with great expence. I do believe that as it relates to judicial decisions there is not a country in the world where more intelligent or correct opinions are to be found. We are told by Judge Wilson that until that country recognized the principle, the world never conceived the idea of trial by jury, and it was some time before the people became reconciled to it. We read that even the penetrating mind of Locke, had viewed it through a glass, and viewed it darkly. I believe, though the judiciary of that country is in an improved state, yet that the judiciary of this country, as to the cheapness, is preferable to that of England, and that still greater improvements may be made, but care must be taken, least by inadvertently lopping off a useful with a useless limb, you sap the whole stock. Let us read the opinion of Mr. Erskine's case of Paine, and that of a clergyman of the name of Capp, a worthy pious man. I hope I shall be excused for reading such a passage as this before this Court, but it is done in order to shew that the common law of England is in some things defective. [*Capp's Sermons*, 118.] As it relates to common law decisions between individuals, there are may precedents which are the bulwark of our security and of the wholesome enjoyment of liberty; but where the crown and subject come in competition, I must say decisions often take place, better adapted for the meridian of Great Britain than for the latitude of this country, and as they relate to the criminal part of the law, there are principles established and pursued, as bloody almost as the laws of *Draco* himself. I did not expect that the learned counsel would have contended generally that the doctrine of contempts would extend to this country—

MR. DALLAS. In the whole of my argument, with respect to the common law, I stated that no more was adopted than was necessary and applicable to the circumstances of the country.

Mr. RODNEY. So I understood the gentleman, in the beginning, but he has seemed to wish to extend it. I can find a case in the common law of England, which was not adopted in this country. [4 *Blackst.* 124.] [Here Mr. Rodney read the law as contained in the statute 33 Henry VIII. which declares that maliciously striking in the king's palace, whereby blood is drawn, is punishable by perpetual imprisonment and fine at the king's pleasure, and also with loss of the offender's right hand.] This is certainly a case punishable at common law in England in this way, but I should be very sorry if it should ever become the common law in this country. If the gentlemen are not willing to adopt all the common law, it is their duty and not ours to draw the line at which we are to stop. There are other cases different from this, as are the colours of a changeable silk. Let them draw the line and tell us in what cases we are to be governed by common law. We merely state that the Supreme Court have not the power contended for. The gentlemen have resorted to various authorities to prove that they have the power. With respect to the discretion which the gentleman contends the Court are entitled to exercise in cases of contempt, I shall retort in the language of the Earl of Cambden, "that the discretion of a judge is the law of tyrants—that in the very best is often defective—but in the worst 'tis vice and folly." It may be replied, that it is a legal discretion, on the construction of a point of law; to be sure I have no objection to admit that they possess this power, but does it follow that it may not be abused; it is as liable to abuse as any other authority vested in the feeble power of man. One of the first authorities that the learned counsel has produced is 4 *Blackst.* 283, which I have already adverted to; and I think that taking it for granted, that the doctrine there laid down is correct, and that the Courts inherently possess such of the common law as is applicable to the people, yet we find nothing to warrant the application of such a power in this country. Here we have no necessity for such an extensive discretionary power being vested in the judges. Can it be correct, that in every case of publication, where a suit is pending, and a prosecution for a contempt is instituted, the accused party must either submit to a punishment limited solely by the discretion of the Court, or swear positively to a denial of the charge, and perhaps perjure himself. These are the substrata on which all this power is built. As for the Chancery books I will not repeat what opinions I have heard and entertain of them. There was one authority read by my learned friend, which of a peculiar nature; I will turn to it, in order to call the attention of the Court to a practice different from the one laid down by the gentleman. [3 *Hawkin's*, 272. *See Appendix, note* E. *page* 5.]

I turn to these authorities in the order that the gentleman has read them, because they will shew, as this author explains it, that the accused must deny the material part of the charge, and not, as the gentleman expresses it, the whole. [2 *Atkins, p.* 469.—*The case of the printer of the Champion, and the printer of the St. James's Evening Post.*]—*(See Appendix, page 7, note* G.*)* Now this court will perceive that this was taxing them with turning affidavit-men, in a cause which was then pending before the court. [*Reads.*] I beg the court to recollect the observations of the lord chancellor; for instance now he states there are three different kinds of contempts, which it seems are to be distinguished by the court, *secundum subjectam materiam;* that is, according to the subject matter before it; but it does not follow that it gives to the judges unbounded privileges in their judicial capacity. The distinction, as to the contempts, may hold good in that country, but it does not in this; because here the liberties of the people are better protected. The gentleman will tell us that there may be a contempt of court, in prejudicing mankind against persons before the cause is heard. That any thing, whatever, said in reference to a cause, is a contempt. But we reply that the constitution says, that the press shall be open, and that the conduct of a Judge shall be open to examination as well as any other officer. It is only when you abuse the judge, in a cause that is pending, that it becomes a necessary power in the courts, as is contended for by the gentleman, to punish contempts in a summary way. [*Reads.*] Here the chancellor takes this distinction, that unless it could be proved that a contempt was meant to the court; and whether it referred to this or that suitor, he had nothing to do with it, if it only referred to the character of the man independent of the court. [*Reads.*] Why now he is referring to the cause in direct terms; he is referring by initials, and it certainly could not make any difference. [*Reads.*] This seems to be the reason for making the decision that he did. [*Reads.*] I have gone through the leading traits of this affair; and here let me observe, that there was as direct an interference with the court as possibly could be, and it was pointedly calculated to prejudice the public mind.

But how can this apply to Mr. Passmore's case? To be sure he has published a paper which I do not justify; it was a paper which I apprehend was of a libellous nature, and which I do not wish to see repeated on any occasion whatever. Mr. Bayard, by the constitution and laws, might have had him indicted for a libel, and might afterwards have brought his civil action for damages; here were two remedies that he could have pursued. Well, sir, but there is another remedy, if the gentleman's doctrine is right, and that is by attachment; the others are too slow, he must have instant redress, and therefore he took this summary way. You have heard the paper read, and I ask this honorable court,

whether, without that comment on the text which the learned counsel has made, they would have known that it referred to a cause then pending before the court? Mr. Passmore might have intended to refer to the suit, but if he did not use initials, it cannot be construed into a contempt. *Voluit sed non dicit.* We wished to do so, but did not do it. I ask whether any one, who will pay serious attention to that paper, and not know of any action pending between Mr. Passmore and Pettit and Bayard, could ever have thought by day, or dreamed in the night, that it had any allusion to a cause between Pettit and Bayard and Thomas Passmore? What is there in the paper that may tend to prejudice the court? Yet if it contains nothing of that kind, I contend that it was no contempt; for the paper, on the face of it, must have something either insulting to the judges, to the proceedings of the court, or attempting to prejudice them in a suit then pending. I further contend, that the people who read it, without being told of the suit between Mr. Passmore and Messrs. Pettit and Bayard, would know no more of the circumstance than if it was in Arabian, Chaldean, Hindoo, Sanscrit, or even wrote in Hieroglyphics. Notwithstanding all this, it does contain observations against two amiable and respectable characters. However if Mr. Bayard had not gone to Mr. Kitchen, nobody ever would have known that it had any connection with a case between Mr. Bayard and Mr. Passmore. Now how does this square with the case of the printer of the Champion, or with the observations of the learned counsel? Even a blind man who had never heard of the transaction could as readily have discovered that it alluded to an action between the parties, as Mr. Kitchen, had he not been informed of the circumstance. Mr. Bayard should have proceeded in any different way, from the one he did; he could not have considered it but in the light of a common case of posting. Well, but Mr. Bayard happening to hear of it, goes to Kitchen, who has not destroyed the paper, and demands it; why says he, this refers to the affidavit which was filed in the cause between myself, and Passmore, and is a contempt of court. I put it on this ground, that, whether independent of Mr. Bayard's knowledge, any man of common sense would have supposed that it had any thing to do with a suit, between Mr. Bayard and Mr. Passmore—that it referred to a suit depending in the supreme court? Why, it speaks merely of a mercantile transaction. But that they would have ever guessed that it referred to a cause in court, is not at all probable, they never could have thought that it referred to a suit; it was more likely they should suppose that Mr. Bayard had made some affidavit, which was a kind of a protest in some mercantile transaction, and that Passmore was kept out of a sum of money for some days by it. I never should have suspected that it did relate to a cause in court, unless he had put it in such language that the people generally would have understood it. As to

whether there was a suit depending or not, we will admit that there was a suit pending at the time. To be a contempt the paper must reflect on the court, and be calculated to prejudice the public mind in his favor. I will undertake to state, that this was not calculated to prejudice the public mind or that of the court. It is true that the chancellor in England is bound by the parliament; but I apprehend that it does not appear that the judges are bound by its authority, or that it can bear upon the present case. Notwithstanding I make this remark, that the judges are not entitled to the range of power claimed by them, yet if they should have it, I am sure the learned counsel will agree with me, that the excellence of every high authority, consists in its correctness and moderation. He will also agree with me, that even after a decision is given in due course of law, the courts of chancery possess the power of totally setting the subject aside, on the score of irregularity or any other reasonable cause; and a number of such causes have occurred. There have been decisions in that court, where the crown has come in competition with a subject, in which all the principles of law and equity have been departed from. In consequence of which, the judges are to be considered in a great measure as the creatures of the crown, on all subjects where its interest is in any way implicated. Cambyses king of Persia, whenever he wanted to effect some favorite object, consulted his judges; they always replied, it is true the Persians have enacted laws, but notwithstanding this, the kings of Persia may do what they list. As it relates to the practice and the course of proceedings of a court of chancery, I will observe, that they are not as strictly limited as a common court of law; for we frequently see that excluding equity and conscience, they undertake to pass decrees which may infringe upon the order and rules of all law whatever. There is one point in this case to which I have not adverted. [*Reads.*] But, sir, in order to constitute the contempt, it is necessary that what has been said must be proved to belong to the cause in discussion; for if the judge has travelled out of the case, his opinion must be extra-judicial,—he has only a right to decide in a given case. When he speaks of a contempt of court, he says every man in this country, who is party to a suit in court should be privileged from abuse. It is impossible that he can contend for this position in its full extent. Look at its effect; that because a man has a suit in court he can whip up a printer who has occasion to mention his name, and who perhaps knows nothing about the suit. Such a doctrine would be monstrous indeed. If it was established, every printer ought to have regularly furnished him a regular docket of the suits and all the proceedings of the court, and he should never touch the name of any man who is party to a suit. And are people to be privileged in this way? Is a printer to be taken up and punished because he abuses a party concerned in a cause without any knowledge of it? It seems however that there are three

kinds of libels. The first kind is scandalizing the court itself, the second abusing parties concerned in causes before the court, the third is prejudicing the people against persons before the cause is heard. Surely it will not be attempted to contend that either of the two first are to be extended here. They cannot apply to the case. But as to the latter, this can only be considered to apply where the paper was meant to injure the character of the party in the cause, and to prejudice the public mind, and where it is calculated to produce that effect.

Adjourned 'till 3 o'clock, P. M.

SAME DAY, P. M.

Mr. RODNEY—in continuation.

Mr. Speaker, and Gentlemen of the Senate,

The next authority to which I shall refer, is among those which my learned friend has read, and is in the same book last quoted, [*page* 488.]—*(See Appendix, page* 39.*)* This was also a cause pending before chancery. This is a case, the court will perceive, where publishing the mere truth, the fact itself, was attempted to be construed into a contempt, and to be made punishable in this very way, by the lord chancellor. [*Reads.*] He distinguishes this case even from the one adverted to yesterday, and which does not any more than this apply to the case now under consideration. The chancellor observes, that "there does not appear the least intention of reflecting upon the persons named in the printed order, but done merely by the advice of the master." It seems that Thomas Passmore did not take the advice of a chancellor, but he took the advice of a gentleman of the bar; and it would seem necessary that a gentleman should have counsel on one side, and an attorney on the other. If I had searched all the numerous volumes for a case that would apply, in support of my argument, I could find none better suited than this. Although the chancellor highly disapproved of the act, yet, as it was innocently done, it was no offence, and that as it did not reflect on the court, it was no contempt. Now what does Thomas Passmore swear? Why that he did not know any suit was then pending, and that what he did therefore was ignorantly and consequently innocently done, and therefore was no contempt of the court. Let me read this part over again. "As to the complaint itself, &c. *(See Appendix, page* 40.*)* Nothing, sir, can be more clear nor more conclusive.

The next authority is *1st Peere Williams, page* 675.—*(See Appendix, page* 24.*)* This is another of the cases referred to by the gentleman. [*Reads.*] Here was a case in which a person advertised a reward, or in other words a bribe, for the purpose of establishing a fact, and, as the lord chancellor says, the cause

was now depending, and it consequently was a contempt of the court. Now, sir, this is precisely within the line and the boundary of distinction laid down in the former case. I will advert to the latter part of the report. [*Reads.*] Now the very point, of "the suit being still pending," is brought before the court. It was objected, that the sentence in the spiritual court and the trial were over. But it was declared in return, that it was not over. This case does not say how it is before the chancellor—but notwithstanding this, the chancellor says it is not over, because affidavits might come in and the court be induced to grant a new trial. Why, sir, the bill might have been filed by one of the parties and an action instituted to try these facts and to have a verdict of a jury before them. Here the chancellor says, that although the thing may be innocently done, and he believes it to be so, yet, as he ought to have known that the cause was depending, he must be punished. Thus the judges told Passmore. He had been guilty of publishing while the cause was pending and he must be punished, however ignorant he might have been when he published. The judges can't listen to ignorance of the law. They make no allowance for that. Nor I don't ask this court to do it. Passmore was mistaken as to a mere matter of fact, at least so he swears. He was mistaken as to the point of the suit being still pending. If a person breaks into my house; I attempt to defend myself, and, in a mistake, I take the life of one of my own servants; as I did it in a mistake, the law takes no cognizance of it. But in a capital case ignorance of the law will not excuse the crime. I shall not, sir, travel through all the wilderness of authorities which the learned counsel has given us. He has referred to 3 *Atk.* 564.—*(See Appendix, page 30.)* This was not a case of attachment for a libel, nor for publishing any thing relative to the proceedings of the court. There is nothing like a libel in this. I shall pass it on. The learned gentleman has also quoted 2*d Burrows*, 792—the King against Beardmore—*(See Appendix, page 14.)* Doctor Shebbeare had been tried for a libel; there had been a judgment or sentence passed upon him; he had been ordered to be put into the pillory, for a certain time; but the sheriff's officer, it was understood, did not execute the sentence properly; he did not put the man's head through the round hole, nor his hands through the small ones; and for his non-compliance with the sentence of the court they punished him. But this has no bearing on the present case; not even those observations of Lord Mansfield himself. The judges not only pass sentence but order it to be inflicted, and in consequence of its not being properly inflicted, it was justly considered a contempt by the sheriff's officer. In 4th term reports, it was deemed a contempt of court to try a feigned issue without leave of the court. In Vernon and Scriven, a case was cited in which the law is laid down, I suppose, correspondent with that of the practice of Pennsylvania. It seems that the

supreme court of Pennsylvania separated as it is, by a wide ocean, from England and Ireland, has a right to strike on any precedent or practice there which may suit its purposes. But it seems also that this case was decided contrary to the decisions in two cases by lord Mansfield. In this motion on behalf of Reed, lord Elsford decided according to the practice in Pennsylvania, that the defendant had his choice of calling for interrogatories, or of dispensing with them. I presume, sir, if this be the law of Ireland it is much more reasonable than that of England. It certainly does appear, in my mind, a practice more conformable to justice, that the person should not be compelled to answer interrogatories, but that the answers should be required only by the defendant. This course was steering between two extremes. On one hand there is the constitution, which says that no man shall be compelled to convict himself; and on the other, the English authorities, which oblige a man to convict himself. It would seem, however, that the doctrine over the water has been changed. Lord Elsford has tried the decisions of Lord Hardwicke and of Lord Mansfield, and has found them to be wrong. He has boldly despised such precedents, and I do say, if the doctrine of attachments is to be established in any way, I certainly wish to see this latter adopted. I pass over a great number of precedents in which the gentleman has told us his doctrine is authorized, in order to come down to the laws of Pennsylvania, in which the gentleman says this doctrine is expressly recognized. [*State Laws*, 1 *vol.* 101.] This is an act establishing the orphan's court. Permit me to remark, that notwithstanding the diligence of the gentlemen, they do not exhibit any act giving the judges of the supreme court general power to issue attachments for contempts committed out of court. But these are only acts giving authority to different courts to issue attachments in particular cases; and I pray this honorable court to recollect, that in all these cases they are warranted by positive law and not by any judicial decision. This gives to the orphan's court power to issue attachments, and I recollect that my learned friend asked where did they get this power of issuing "their attachments for contempts?" Well, sir, but would the gentleman contend for this, sir, when it must so materially affect his own argument. Certainly if they had it by the common law there would be no necessity for the legislature to give it. I think if any inference is to be drawn, it is this, that without this positive act of assembly, they were not vested with the power of summary process, and if they had not the power granted to them in this act, then *a fortiori*, they had no right to exercise it. Here is an act of assembly giving equity powers to the orphan's court, and we know there is no other court clothed with similar powers. Here a capias issues without any notice previously given. The supreme court have no such power. But notwithstanding this, the gentleman cannot, I believe, produce one instance among all of the decisions of the or-

phan's court, in which they have fined and imprisoned for thirty days. In page 261 of the same book, it is stated in section 3d of the act for the relief of insolvent debtors, that any person discharged from any "debt, damages, *contempts*, costs," &c. Here then is the expression "contempt," and the gentleman seems to draw an inference from this, that attachments for contempts were in existence at that time. But I should apprehend that as the proprietary government had the power of remitting fines and punishments and granting pardons at that time, it must have been carried on in the nature of a civil process. As for instance we will suppose A. puts another in jail, in order to get his money; there, if a man is imprisoned for debt, he ought, under this insolvent law, to be discharged from confinement. This section seems calculated alone to prevent his being twice confined for the same thing. A great many acts have been quoted, passed not only before the constitution of 1790, but before the revolution. There is one act that has been cited, by which the auditor of public accounts issues attachments; but I make the same answer to this as to the others. Why because there is no necessary criminality, in case a person has never been cited, and does not appear in person. This shews clearly that there is no necessity for a contempt to justify an attachment; for by this a man residing on the banks of the Susquehanna or on the Ohio, may have an attachment served on him without ever having notice to attend; and it comes within the common case of sending attachment after a witness, and is a case in which not the least criminality attaches to the party against whom it issues. An act has been cited that establishes the court of admiralty; a court that proceeds without a jury, and is vested with this power of proceeding by attachment; and it has been said that the counsel of censors took no notice of the investment of this power when they passed in review before them the proceedings of government and all its subordinate branches. I do consider the legislature perfectly correct in all its acts and all its proceedings, but I do not apprehend that this authority can be justified, for the court of admiralty proceed differently from all the other courts of law. There is'nt such a thing known as punishment by attachment for offences committed upon the high seas. The comptroller too has been vested with this summary power, in sundry cases. I will only observe, that the old constitution recognized the court of admiralty and authorized the appointment of a president thereof; so that the court of admiralty was in some degree a part of the constitution expressed. There have been some acts cited, passed since the adoption of the constitution of 1790, one indeed in which the county commissioners are authorized to issue their attachments. I will not, however, advert to them all. I wish to give my sentiments as fast as I can, and not to occupy much time of the court. My learned friend will follow me. I shall therefore go cursorily over the principal authorities, and be as brief as I can.

The first act which the learned counsel has resorted to, in support of the power of the supreme court, is in the 1*st. vol. Laws* 179. By this law, he contends the judges of the supreme court are vested with all the powers, and in as full and ample a manner as the court of king's bench. But in that act there is no particular mention of attachment, and notwithstanding this silence, the learned counsel contends they derive their powers from this particular act. If they have all the powers of the court of king's bench, they are indeed vested with very extensive authority. There if a man strikes another in the presence of the court, even without drawing blood, he may by order of the court have his right arm cut off; and if the doctrine was established that the supreme court have as much power as the court of king's bench the, judges would have a right in a summary manner to cut off his right arm, and I suppose his leg too, if it offended. The court of king's bench possess the power of punishing in this manner, and, as the law books shew, have sometimes exercised it. If this conclusion is correct, let me ask, if the possession and exercise of this power is not inconsistent with the letter and spirit of the constitution.

The learned counsel, said Mr. Rodney, has stated that the judges of the supreme court possessed this power before the adoption of the constitution of '76. [*Reads.*] Well now this power of cutting off limbs was not authorized by the constitution; but it seems that chief justice Kinsey has reported a case in a book which has been cited, and has decided a case upon the subject of attachment. It was stated that the recognition of the authority would appear in the arguments on Mr. Oswald's case, [*Del. Rep. note to Oswald's case.*] It does not say that any more than the one solitary instance is relied upon to shew that they had the power to proceed in this summary way. The constitution of '76 says they shall have the powers exercised before by the supreme court; and thus a single solitary instance is to prove that the court have the full right to the exercise of an authority, of which only one example can be produced.

Some acts, Mr. Rodney said, have been cited to shew that it was necessary to give the supreme court jurisdiction, in all matters exceeding thirty pounds, in the city and county of Philadelphia. By the constitution of 1790 it is said, the supreme court is vested with the powers usually exercised by them; but between the constitutions of 1776 and 1790 (which by and by I shall examine,) this additional jurisdiction was vested in them; and this is to justify the conduct of the judges of the supreme court. By the act of 1791 the jurisdiction of the supreme court is stated pretty nearly in the words of the constitution; but they are not to exercise a jurisdiction inconsistent with the constitution.

We are to recollect, that the constitution of 1776 declares, that the supreme court shall, besides the powers usually exercised, have such other powers as may be found necessary by future general assemblies—but "not inconsistent with this constitution." Now, sir, this power would be inconsistent with the constitution, and therefore the supreme court have it not. But it seems that chief justice Kinsey, has reported in a book which has been cited, that the common law of England is in force here until altered by acts of assembly, and upon that principle had decided a case upon the subject of attachment. This was stated I believe in the argument upon Mr. Oswald's case; but there does not appear but the single solitary instance, and this is relied upon. The constitution of 1776 says, that they shall have the powers usually exercised before the revolution. But here a single solitary instance is to prove, that the court have the full right to the exercise, of an authority of which only one example can be produced. By the constitution of 1790 it is said, that the supreme court is vested with the powers usually exercised. Between the constitution of 1776 and that of 1790, on this subject, I shall by and by examine the difference. By the law of 1791—3*d Vol. Laws*, *page* 92—the jurisdiction of the supreme court is stated pretty nearly in the words of the constitution. It is to have the same powers as heretofore, but it is not to exercise a jurisdiction inconsistent with the constitution. I merely cite this to shew that the legislature of that day thought as I do on the subject. "*Sect.* 1. That the supreme court shall be established in the same manner, and with the same power as it hath been heretofore established, by the laws of this commonwealth, consistently with the provisions made in and by the constitution of this state."

In an act contained in the 4*th vol. page* 463, it has been said, that the power has been recognized, and the supreme court is there vested with the summary punishment of contempts. But the question still is, whether the authority extends to this given case, and in what manner the court were to try issues therein, for punishing contempts; and what, under the constitution, is the proper process to carry into effect the powers before granted? The learned counsel has adverted to some precedents established by the legislatures, particularly to the case of Whitney and Randall, before the congress of the United States; and the case of John Nicholson, before the legislature of Pennsylvania. It is stated that Whitney and Randall applied to congress for the preemption right to a large tract of land, and went some considerable length in attempting to corrupt the members; upon information of the circumstance, the House of Representatives actually proceeded against them by attachment, and ordered them to be imprisoned; however, on their addressing a memorial to congress, they were liberated. Mr.

Nicholson wrote an insolent letter to the House of Representatives of Pennsylvania, for which he was called to the bar of the House; however, I do not know whether he made atonement; and what the nature of the attachment was, I am not informed of. The learned counsel has mentioned some judicial decisions on the subject of attachment; it seems that several cases occurred before the constitution of 1790. Oswald's case in 1788, and the case of the Commonwealth against Brown and Mitchell, in 1789, and one single case in which the court thought proper to adopt the English mode of trying foreigners, *per mediatate linguæ*, that is, by giving him a jury composed of one half citizens and the other half foreigners. The case of Brown does not appear very material, and I believe on some submission to the court he was discharged. Here is the case of the Commonwealth against Antis, on motion of Mr. Bradford to shew cause why an attachment should not issue against him. But this does not bear upon the present case. The case of September term 1801, of the Commonwealth against Bradford, and in April 1789, of the Commonwealth against Andrew Brown and J. Mitchell. This was on a rule to shew cause why an attachment should not issue against them, for publishing a certain piece in the Federal Gazette. Brown appeared and answered interrogatories in a summary mode—Mitchell submitted. Brown was fined £5 and the costs—Mitchell £3 and the costs. I believe it will appear that this attachment was issued in consequence of a publication respecting a cause then depending in court, and which was calculated to produce an effect upon the case then pending. But the only case which is reported at considerable length, and which appears to be much depended on, is the case of Eleazer Oswald; and if ever there was a case in which the court would have been justified in resorting to this measure, it was in this instance. Mr. Brown had a school of young ladies, and Mr. Oswald libelled him in a gross manner; but instead of resenting it by personal violence, or indicting him for a libel, Mr. Brown took the middle course and brought a civil action against him. Mr. Oswald made a most shameful and very dark and malignant publication against the judges and Mr. Brown. In this publication, he called on his countrymen to assist in defending him from what he termed persecution; he made a solemn appeal to the public from the proceedings against him, and did it with a view to inflame the public mind. Such a publication was not warranted even on the score of the proceedings against him, for it was not delayed with a view to vex him, but it was delayed at his own request, and done at the instance of his friend Col. Proctor. The publication was in a public newspaper, and he who run along the street, to use the expression of my learned friend, might read at the first blush that there was a cause then pending—they knew it alluded to a case between Andrew Brown

and Eleanor Oswald. This is the strongest case that could be possibly put, for this man had been a libeller before. This was a libel not only on the court, but upon the jury of the country whose minds he wished to warp, and whose judgment he wished to prejudice. But even this case has a very respectable authority opposed to the mode of proceeding; it has the venerable name of Bryan as dissenting from the court, not as to the impropriety of the offence, but as to the mode of punishment. He thought the mode of proceeding ought to be something different. "He did not mean to give an opinion as to the mode of proceeding, but had always entertained a doubt as to the legality of the process by attachment, in such cases, under the constitution." Notwithstanding he doubts the legality of proceeding by attachment, it does not alter the name of contempt. As to Passmore's publication, I do not say it was not an offence, which ought not to have been punished; but if it was an offence, I say you ought to have proceeded against him by indictment; and the probable consequence is, that the court would have fined him. If not, then in the name of God, Mr. Bayard should have been left to pursue his own course; he might have brought a civil action, and perhaps he might have recovered one thousand or two or three thousand dollars damages; nay, there have been, I think in some instances, four and five thousand given, for printing offensive and libellous matter. These are two of the remedies pointed out by the learned counsel, and we should reasonably think that these two methods of punishing him were fully adequate to correct the evil, as the object of all punishments is to prevent a repetition of the offence. No, we are not yet done with him; we will have him brought to the bar for a contempt; and we know the very moment in which it is to be done, the thunder-bolt will pursue the flash, and we shall have our civil action. But Judge Bryan, seeing the danger that might result from such a practice, very properly said he always doubted whether, under the constitution, that kind of proceeding could be had. But how are we to consider the matter when it was before the legislature? It is true, sir, I am told that when the subject was discussed in the legislature, and it underwent a very elaborate one indeed, and on taking the question, there was a majority, in the legislature, in favor of the judges; and this decision is to be a complete justification of the conduct of the judges on the present occasion. But although there was in that case a majority in favor of not impeaching the then judges of the supreme court; yet it does not follow that all the majority considered their conduct as right; and though there was a majority in their favor, there was also a strong and respectable minority—men of constitutional knowledge, constitutional judgment, and constitutional information. This ought to have taught the judges a useful lesson. How much better would it have been to adopt the mode frequently

used in the king's bench, and "waved giving judgment by consent?" How much better to say, Mr. Bayard, you have a remedy for this injury either by indictment or by a civil action? Why if a man burns my house, I cannot bring him up to the post at once, by this summary mode; no, sir, it must first go to a grand jury and then to a pettit jury, in short, it must run the race of the law. And shall not this remedy be considered as fully efficient to prevent a printer from publishing respecting a cause then pending in court?

There is one part, however, of the argument of Mr. Findley, to which I must subscribe. I cannot think that for a mere error of opinion the judges are liable to impeachment. Tho' at the same time it remains with their counsel to shew that it was the product of mere honest and upright intention. But, sir, they can't dive into the minds of the judges to prove it. I would wish, Mr. Speaker, to conclude this evening, but I feel myself so much exhausted, that I wish the court to indulge me.

Adjourned 'till ten o'clock to-morrow morning.

WEDNESDAY, January 23, 1805.

Mr. RODNEY—in continuation.

I return my thanks to the honorable court for their ready agreement to adjourn when I felt myself unwell last evening. I had then been adverting to the case of Oswald, which I endeavored to shew did not apply to Mr. Passmore. The learned counsel has cited another case, it is the case of the bishop of the catholic church, but in the winding up of the business, the gentleman has not told us what became of it. But I should think that the case of Mr. Carrol, a catholic bishop, issuing his fulminations according to the functions of his office, with which he was invested by the pope, does not apply to the case of Mr. Passmore.

Having passed in review the various authorities cited by the learned counsel, I have only to remark, that there is only two cases that in any way apply to the one now under discussion; and on the ground of those cases is the whole of this argument built.

Let us now advert to the constitution of 1790, and I shall be very brief because I humbly hope that the constitution secures nothing more than the bill of rights, or magna charta, extorted from king John, sword in hand, by his people.—The king himself retained his main prerogatives, although he seem-

ed to surrender much. He granted to some towns the privilege of fishing;—to others, the right to hold fairs, and so on; but these are far from being the rights secured by our constitution; they are not the general and imprescriptable rights which are solely vested in, or derived from, the people, the true source of power in every country, and the only physical and moral source of free government.

It is unnecessary to state the principles of our revolution. When the people of America broke the trammels of British tyranny, when they broke the chains with which we were fettered, they procured to us freedom and independence,—the blood spilled in its defence is yet scarcely cold. Look at the constitution of 1776; and in the preamble to that instrument what do we find. [*See Constitution of* 1776.] Let us then, gentlemen, look at the declaration of independence, which, as a state paper alone, commands the admiration of the civilian; and confers honor on the man whose mind conceived the glorious plan; drawn as it is, not in the gust of passion to answer the purposes of a moment only, but to render it permanent, it is marked with that dignified moderation and firmness which has succeeded in commanding an esteem for its author, and which have again called him to the helm of government with great marks of public confidence; not obtained by any low cunning or mean artifice, but by the confidence of all America, which I trust he never will betray. Let us see whether one of the charges against the king of Great-Britain, contained in this declaration, is not applicable to the case now under consideration.

"He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by laws; giving his assent to their pretended acts of legislation."

This is one of the acts of tyranny which were made a charge against the despot of England; and when we come to look at the new constitution, we shall find that this trial by jury is a very great object in the framing of that instrument. It appears that in the convention that framed the constitution, that whatever was their difference on other points, it appears that the trial by jury was zealously defended, and that they all united in the preservation of the liberty of the citizen and the liberty of the press. My learned friend has given us an elaborate comment on the trial by jury; he has also commented on the ninth section of the bill of rights; and observes, that a distinction is taken between those prosecutions carried on in the form of an indictment, and those carried on in the nature of an information. This he does to shew us in what cases a grand jury is dispensed with. Suppose I admit that there is that dis-

tinction, what benefit will his cause derive from it? In the very next section it says, that "no person shall for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or by leave of the court, for oppression and misdemeanor in office." Every word of this section requires the consideration of the Senate; and it is necessary to ask, was Passmore's offence indictable or not? If it is indictable they cannot proceed against him by attachment or information; but if it could be proceeded against by indictment, that mode ought to be preferred; and the party have his constitutional privilege of a trial by jury. Those, sir, are the excepted cases expressly stated, and I am sure the gentleman will not tell us that Mr. Passmore's case is among those exceptions.

Here we come to the very *jit* of the venerable Bryan's hesitation in the case of Oswald. If it is an indictable offence it shall not be proceeded against, nor can it be punishable in any other way; this is all plain sailing, and does not require the eye of a casuist, or any man possessed of more than common sense to understand it. The learned counsel contends, that there has not been secured to the citizens of Pennsylvania, the right of trial by jury in cases like this. That the court has the power of attachment; but if the powers of the court extend to such general and unlimited terms, I ask, where will they end? If a law of the land were to pass, vesting this power in the court, the judges might undertake to convict; but I think the framers of the constitution, in the ninth section of the bill of rights, wished to put it out of the power of the legislature to take away the right of trial by jury, unless it be consistent with that article. They did not intend that this power of summary process should be exercised by any branch of the government whatever, where a trial by jury could be had. I hope the court will decide so as to meet the views of the framers of the constitution, and by their decision will establish a permanent security for the trial by jury, so that hereafter it may be considered as the anchor of hope, which in boisterous seas will enable the vessel to ride out the storm; for it is the will of heaven that in some times all things should fluctuate, and states and nations be involved in storms and tempests; but whilst the trial by jury is preserved, the citizen has a strong safeguard. For my part I think it so sacred, that deprived of this security, I would not venture to take away the life of a sparrow, nor even pluck a feather from its wing. Such is the security which trial by jury affords to the liberty of the citizen, that no man could consider himself for a moment safe without it.

I have now adverted to the material parts of my first proposition. I have endeavored to shew that it is not possible that this summary power is inherent in the court; I have also endeavored, to shew, that even admitting for argument, that the court may exercise some common law powers, that the common law so far as it operates in this case, has not been properly applied. I have adverted to the judicial decisions on the subject, which have been cited by the learned counsel, and I believe I have shewn that those precedents are confused and inconsistent, and that we ought to consign them to the tomb of the Capulets, so that even their troubled spirits should not hereafter haunt the liberties of the people.

Whether it be such a misdemeanor as to authorize an impeachment?

Even admiting Oswald's case to be a correct one, what does it prove? Why I humbly conceive that if he had answered interrogatories in the manner Mr. Passmore did, he would not have been fined or imprisoned; for I contend that Passmore's contempt was purged by the answers to the interrogatories. When I was stating yesterday, that the ex parte affidavits for a rule to shew cause, were the grounds on which an attachment was made absolute, I was corrected by the learned gentleman, who has said, that upon the rule to shew cause, the party accused was at liberty to examine witnesses face to face. This may all be correct, but I cannot help remarking to the gentleman, that it appears to me, that the constitution has been obliged to bend and to warp to give any colour to the exercise of this power. In the two decisions which took place since the revolution, it appears that the interrogatories are the previlege of the accused; but the books go to prove that the interrogatories should go in the nature of a charge, and this is according to the opinion of judge Blackstone. I say, agreeably to some of the decisions that have taken place, the interrogatories are a matter of right on the part of the prosecution, and are exhibited in the nature of a charge;—and in the Irish term reports where lord Earlsfort differs in opinion with lord Mansfield, the contrary doctrine is supported. I could refer to some place in Burrow's, where lord Mansfield questions the book of Mr. Mosely. This case reported by Mosely is the one, on which the judges of the supreme court have founded their decision; and this was the only case that could justify the court; but we find it laid down in books of much higher authority, that the interrogatories are in the nature of a charge. First in Blackstone's commentaries, which are the work of an elementary writer of the greatest estimation. I will read the language of judge Blackstone, in order to be correct.

"This process of attachment is merely to bring the party into court; and when there he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court, with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days; and, if any of the interrogatories is improper, the defendant may refuse to answer it and move the court to have it struck out. If the party can clear himself upon oath he is discharged; but if perjured, may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and some times by a corporal or infamous punishment. If the contempt be of such a nature, that when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already possessed of, (as in the case of a *rescous*) the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court."

This, sir, was the British law at the time when the case of the Commonwealth against Oswald took place. The constitution, though had provided that no man shall give evidence against himself. Well but it is said by the common law that the accused is bound to answer interrogatories. Well if he does answer, what is the effect of his answer? I will read to this honorable court what took place at that time, in the supreme court.

"*M'Kean, Chief Justice.* Will the defendant enter into a recognizance to answer interrogatories, or will he answer *gratis?*" Methinks for my own part and from what every man who had read Blackstone's commentaries must think, naturally, that Mr. Oswald was obliged to answer interrogatories. [Mr. Rodney read further extracts from this case for which see appendix, pages 60—61—merely observing that on this occasion the expressions of the chief justice were strong.]

Now let us see, agreeably to the principles of this case, how it will square with the present. What was the nature of the charge against Mr. Passmore. Here is the affidavit of Mr. Kitchen, over which is a copy of the paper which has been so often read. [*Reads Mr. Kitchen's affidavit, for which see page 56 of this book.*] You will find that James Kitchen could not swear that it had reference to the cause then pending between

Bayard and Passmore; he could only simply say that he had seen Passmore put up the paper. Mr. Bayard could come forward and say that the paper is in the hand writing of Mr. Passmore. [*Reads Mr. Bayard's affidavit, for which see page 37, of this book.*] Now Mr. Bayard has to swear to some very necessary facts in order to give ground to the attachment. He first swears that he verily believes the suit to be still depending in court. He next swears that it relates to the affidavit taken by him before John Inskeep, Esq. and that he has no other suit or controversy with Passmore. These two facts were necessary to give ground to the motion for a rule. Mr. Passmore was then consequently served with a rule;—he appears, and from the proceedings in this case, it would seem as if no arguments were necessary; that it depended only on the affidavits. Mr. Levy states that the fact of the publication was admitted; but he requests the court to proceed in the usual way by directing interrogatories. Then it was, it seems, that my learned friend drew up, and Thomas Passmore answered, those interrogatories. The very first goes to the very *jit* of the business. "Was there an action depending," &c. [*See page 15, of this book.*]. The second interrogatory goes to another point equally essential to the conviction, agreeably to the decision in Dallas's reports. [*Reads second interrogatory, see page 15, of this book.*] This shews that it was the opinion of the learned counsel himself, at that time, that it was necessary to establish these two facts. Now what does Mr. Passmore say, relative to the first fact? He tells you, for he swears to the best of his judgment and belief, and he gives you the reason for his belief, that there was no suit depending in court at the time. But, says the gentleman, this is not a question of fact, but of law, and is to be determined by the court. But I say it was a question of fact, and I see whether the ignorance of Thomas Passmore did not excuse him. We will assume that the fact was not so; and I shall ask, whether this ignorance of the fact did not excuse Passmore? We will take it up on another ground; had Passmore really swore that there was no suit depending when there was a suit depending, he might have been prosecuted for perjury; for though ignorance of the law will not excuse a man, yet ignorance of the fact will. Judge Blackstone in speaking on this subject says, "Ignorance or mistake is a defect of will, when a man intending to do a lawful act, does that which is unlawful. For the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act." Now we will suppose that Mr. Passmore knew he was liable to be punished, if he published any thing respecting a suit depending in court; we will admit that he knew all this;—but he did not know that a suit was actually pending, at the time that he published, I say this was not knowing the fact;—therefore it is not unlawful, nor can it be

punishable. Because the thing was done by mistake, and because Mr. Passmore was ignorant of the fact at the time that he did it, is he to be found guilty, fined and imprisoned, when he was really innocent? I say he was innocent because he was really ignorant of that essential fact. But, says the gentleman, this was not a matter of fact, but matter of law. If so, how came Mr. Bayard to swear to a matter of fact. Now no court ever permits a witness to swear to the law of the land. Never was there a case where a witness was called to swear to a matter of law, because that is supposed to be known by the court. He has only to swear to matter of fact. But to shew that the learned counsel must have never understood it in this way, I will refer to the interrogatories drawn by the learned counsel, and here we find he examined it as a matter of fact, and not as a matter of law. But could not this fact to which Mr. Passmore was to swear have been ascertained by going to the office of the prothonotary where the record is kept. There the writ and the judgment issues, and there you can ascertain the matter of fact whether the suit was depending or not; and certainly Mr. Passmore had a right to presume from the records there, that the suit was at an end. We are told that "if he swears to what is really incredible he is not to be believed," and a book has been cited in support of the doctrine. There has been a case in the year 1796, adverted to. It is the case of Cropley, Clark and Blarely. This case, even if it had the authority of a precedent, could not be considered as forming any groundwork for the proceedings in the case of Passmore; as it does not appear that any interrogatories were exhibited in this case; that the parties agreed to try it by affidavit. This opinion which is subscribed by Mr. M'Kean, is as follows. [*Reads.*] But it will appear that there is a difference between the proceedings of a court of chancery, and that of a court of common law, and the supreme court seem to have adopted the rule of proceeding as laid down in Moseley's reports, which is a chancery book; and directly in the face of the case *in Douglass*, 516. It appears that this doctrine of contempts varies so, that it may be called a perfect legal Proteus, capable of changing its form and its colour every hour and every moment.

Sir, I find that when Passmore comes before the supreme court, he not only swears to what he believes, but he swears to the grounds of such belief, that he believed the suit was at an end; because that the exceptions were out of time, the judgment had become absolute, and execution had issued; and I insist upon it, if the gentleman will establish any part of the law in Dallas' reports, that he will establish it altogether, and then Mr. Passmore will be found to have completely purged the contempt. It has been said that these answers are drawn in an evasive manner; because he swears only to the best of his judgment and belief, and does not swear positively to the

fact, and that this answer does not lay the foundation of a prosecution for perjury. This position is in opposition to the doctrine of lord Elsworth, which I will refer to before I read that which I have in my hand. I think the gentleman, if my memory be not treacherous, has produced authorities for the purpose of shewing, that where a party swears to the best of his knowledge and belief, he is not indictable for perjury. Even taking it for granted, that he has produced cases of this kind, yet there are many cases in the books, which contradict the position. I have not the book in court, but it is in a note to Tucker's Blackstone, that a man may be indicted for perjury, if he swears that he believes to be true what he knows to be false; and if it should really be the fact, that Thomas Passmore did know that the suit was pending, when in the face of the court and of his God, he swore that to the best of his knowledge and belief there was no suit pending; I say if he knew this, and swore as he did, they would have been justified in an indictment for perjury. But, it is said, this is not a full answer to the charge contained in the interrogatories. Now what is the fact? Why the first question asked of Mr. Passmore is this: "was there or was there not a suit pending?" Passmore swears that to the best of his knowledge and belief there was not. The second, premising Passmore's knowledge of the fact, asks whether he did not refer to the affidavit of Mr. Bayard? This is not a material part of the charge. But what does he say to the most material fact? Why he swears that to the best of his knowledge and belief, there is not a suit pending at the time. Suppose a person states a thousand things in the interrogatories, shall the defendant be obliged to answer this that and the other? If he answers the material part of the charge, as Mr. Hawkins lays it down, he purges himself of the contempt; and here I aprehend Thomas Passmore did answer to the very essence and *jit* of the charge. If I am correct, this conclusion must follow, that the offence, if any had been committed, was absolutely purged by the answers to the interrogatories.

I am sensible, that in the course of this business, my deficiency of talent to support it in a proper manner, must have been observed, and I regret that the cause should suffer injury through my want of ability. I am sure, had I possessed the talents of my learned friend, my arguments would have been much more serviceable to the cause I endeavor to support; for they, like the powers he is master of, would not only enable me to draw support from the strong positions of the case, but, like the soldiers of Cadmus, to raise powerful auxiliaries from the most trifling objects. I have endeavored to give this case all the consideration my leisure would admit of; for I was a stranger to it until I arrived here. To be sure I had been furnished with the articles of impeachment, and some of the testimony, but from the press of business at Washington, I had not time to look at

them. I beg to be understood as speaking with great diffidence in this business; and indeed in the construction of acts of the assembly, I only rely upon my arguments as they are applied generally to the subject.

It is now only our duty to consider whether the judges have acted in such a manner as to be liable to impeachment.

I stated yesterday that for a mere honest error or mistaken opinion, it would be hard indeed if these judges should suffer; I then made the observation, and I now repeat it, as not only due to the learned counsel, but to the House of Representatives, and to the judges at your bar. But it is our duty to see whether those respectable characters have exceeded the powers granted to them. Let us review the case in court when Mr. Passmore was brought forward for the contempt. I do not wish to paint it in colours calculated to mislead the deliberate judgment of the court. I wish to draw upon their feelings for any deficiency in the portrait.

What was the case at the moment that Passmore was brought before the court—at a time when nothing more than the mere rule to shew cause had been served upon him? What was the language of the chief justice at that time. "Sir, you have been guilty of an enormous libel on the characters of two gentlemen, which requires great atonement, and the court hope you will make an apology." This was sworn to by Mr. Passmore and attested by Mr. Henry. From this it may be inferred, that they meant to punish first, and try afterwards. But even the deity himself, omniscient, omnipresent and omnipotent as he is, did not condemn even Adam until he had said unto him, "Where art thou?" But there seems to be less mercy on earth—For, here "where man is clothed with a little brief authority, he plays such fantastic tricks before high heaven, as make e'en angels weep."

He was told to prepare himself to make an handsome apology to Messrs. Pettit and Bayard, before he was convinced that he was wrong. Surely the judges were not constituted a court of honor by the constitution. They were not to hold the barometer of honor and determine what kind of an apology was to be made by Mr. Passmore to Mr. Bayard; but they seem to have been more actuated by a spirit of romance than any court of ancient chivalry. This certainly was not a part of their duty. If this kind of proceeding is sanctioned, we do not know whither they may carry it—to what cases it will not be made to stretch.

I will agree with the learned gentleman, said Mr. Rodney, that it is better that ten guilty persons should escape, than one innocent person should suffer punishment; I readily give them the benefit of every principle of this kind, that is applicable to the present case. Nay, I go further, I admit that it will redound more to the honor

of the state to acquit than to convict the judges, if this court could reconcile it to their consciences. I say it would be more to the honor of the state. But they are sworn to do strict and impartial justice.

I agree with the position of the learned counsel, that in a case of assault and battery, the party who is injured is the public prosecutor and a party too; and it is frequently the usage to inquire whether the party injured has had redress, and that that is taken into view in the decision of the court. He has cited the case of the Commonwealth against Bradford; I do not recollect the particulars of the case; and I do not wish to take from the respectable characters now before you any advantage they can derive from this statement; but I never knew of a case where the court were prevented from passing sentence by the compromise of the parties; but if the court have this optional power of passing sentence or not, how does it apply? How does it comport with clemency when they told Mr. Passmore before he had been heard, that the court expected he would be prepared with an handsome apology to Mr. Bayard. Let us look at the answers of Mr. Passmore to the interrogatories. And will any one say that these answers, instead of purging the contempt, were an aggravation of the offence? Why, as to the judges, it was allowed that there was no insult offered to them. As to Mr. Pettit, he made all the apology he could make, and because that he would not make an apology to Mr. Bayard, was he to be humbled in the dust? Was he to put on sackcloth and ashes and roll on the ground at the feet of Mr. Bayard? In my opinion these answers actually purged the contempt, and were calculated to go great lengths as an apology. But it seems that if a complete apology to Mr. Bayard had been made it would have diverged the rays of that malignant meteor which shone upon Mr. Passmore. However, I will not enlarge on this disagreeable subject, as I would not wish to excite unpleasant emotions, and I forbear to use any acrimonious language, as it would be painful to me to wound the feelings of the respectable and venerable defendants. But at the same time it would be necessary to impress on their minds, that if they do wrong they are to recollect that there is a tribunal to which even they are amenable. It is necessary that such a tribunal should exist in every country; and they ought also to recollect, that every free commonwealth has its Tarpeian rock.

I trust, said Mr. Rodney, that this court will never be swayed by passion or party prejudice. The spirit of party, I know, is of so subtle a nature, that it may sometimes introduce itself into the breast of the most honest and virtuous man; but I trust that the court will elevate themselves above it; that they will judge impartially, and decide, as justice would herself, upon argument, fact and law.

Mr. INGERSOLL.

Mr. Speaker, and Gentlemen of the Senate,

Accustomed as I am to speak in public, I rise upon the present occasion with unaffected diffidence, and peculiar sensibility to fulfil the duty of my situation. The cause involves in its consideration, questions the most interesting that ever came before a Court, in this or any other country. The opposite consequences of your decision, acquittal or conviction, are in my humble estimation, incalculable; in the first event, I think I see liberty, that greatest of human blessings, secured by law and an independent judiciary—an independent judiciary, which I think I can shew that the people have considered as indispensable to secure all that is dear and valuable in this life. On the other hand the rage of innovation, disregard of experience, and enmity to system, will paralize the administration of justice and the constitution itself; insufficiency, insecurity and confusion will follow in the train; and we ought, sir, to recollect that what has happened in other free countries may take place in this. If the barriers of the constitution are removed, if its ramparts are broken down, if one co-ordinate branch of the government (for such I contend the judiciary is) is made subservient to the views of another, we may worship a name;—but the constitution, plain and expressive as it now is, from that moment will become a dead letter. Books, profane as well as sacred are written for our instruction, and they all go to shew, how easy some aspiring man may take advantage of anarchy to introduce despotism, and raise himself to power on the wreck of the constitution. You will determine whether these ideas are the illusions of a gloomy and disturbed fancy, or evils rationally to be apprehended. If my learned antagonist can satisfy us that the defendants have intentionally violated the laws and constitution, or that they have been guilty of bribery, corruption, gross partiality, wilful or corrupt oppression, and the conviction is brought home to my mind, that instant I will abandon them and their defence, and say that conviction ought to follow. But there is no necessity to pursue this secondary mode of defence. I shall endeavor to satisfy you, and pledge myself to shew to this Senate that the power and authority exercised by the judges, is legal and constitutional, and recognized from time to time by the acts of the legislature and confirmed by repeated judicial decisions. Allow me, sir, to digress for a moment in order to shew that my colleague has been erroneously charged with inconsistency. I beg leave in the course of my observations to render him that justice, he would do to me on a similar occasion. Reference was made to Addison's Trial to shew that my colleague was inconsistent; in order to shew that he then

said what he now says, I beg leave to read the passage. *Addison's Trial, p.* 113. Here, sir, we find that the opinion of my colleague at that time was the same as it is at present.

I cannot immediately pass from the principles which I have already suggested: the danger of innovating on the constitution, from the mistaken idea of reform. History is philosophy teaching by examples. We have seen, sir, the situation and the progress of republican France. That republic, whose splendor astonished an admiring world; that country which had but lately cast off the shackles of slavery, now sunk under a tyranny more intolerable than that from which she emerged. Trace its rise, progress, declension and ruin, recollect the facts that still deform the page of her revolutionary history, and I ask if similar causes must not produce the same effect in both hemispheres. There we find, that an immoderate jealousy of the executive and judicial departments, has converted a free government into an absolute despotism. These memorable events furnish useful lessons to the citizens of the United States—the last asylum of liberty. The French people had their written constitution, bill of rights and declaration in favor of personal liberty. They mistook the means by which to secure the end; restraint, even by laws founded on common consent, they rejected as degrading to freedom.

I thank the manager for leading us to take a retrospective view of the infancy of the United States; a recurrence to the principles of the revolution is at all times pleasant and profitable. I believe we shall find that the American patriots of 1776, had as much zeal for liberty as the French of 1793; but it was a zeal more accordant to knowledge. While they designed the end they also contemplated the means; they considered a judiciary, independent of the frowns and smiles of the legislature, as an indispensable requisite in their system. A judiciary that could resist the shock of conflicting factions, and regardless of party, keep the even, unruffled tenor of its course, calm, dignified and firm, in the midst of political storms. To the great charter of our liberties to which the manager has referred us, I make the solemn appeal; I adhere to it as the ark of our political salvation. With inflexible perseverance let us consider and understand, that we may revere and obey; I am willing that my clients should stand or fall by this instrument.

Sir, I have heard with much surprize, from what motive I do not pretend to say, a great deal of extraneous matter addressed to the Senate. Even the virtues as well as the vices of the bar pressed into the service of the prosecution,

with a view to sink the judges to the earth with the accumulated weight. The counsel who have been applied to, to assist in the present prosecution, and have refused, have been referred to by the manager. Is censure deserved on that account? Or on the other hand does not the circumstance do honor to the individuals and the profession? Instead of being mercenary in their views and governed by considerations of interest only, they refuse the money of the State, sooner than advocate a cause they deemed legally and morally unjust; repelling at once the insinuations, that lawyers for money will undertake any cause, and that the bar are tired of the tyranny of the judges and wish to be rid of them. I must confess, sir, I did not think these insinuations altogether kind or liberal.

Sir, I am sorry so much has been said respecting the profession of the law; I refer to a book written by an American; a book written by Doctor Ramsey, and familiar to all of you, in order to shew that in the revolution the gentlemen of the bar took their full share in the perils of the day. These you will be pleased to observe are not my words but those of Doctor Ramsey, a name dear to the mind of every man who regards the liberty of the people. [*Reads Ramsey's history of the American Revolution, page* 199. *See Appendix, note* K 3.] I acknowledge that this is matter extraneous and foreign to the question; but when it is brought forward on one side, it must be repelled on the other. And who, sir, I ask is the immaculate patron of purity whom the manager has selected, to attack the morality of the profession and oppose to our fellow-citizen Ramsey? Godwin! a man whose name shocks the ears of every one who regards piety or even the common decencies of life. I confess that I am no pupil of the school or philosophy of Godwin. I do not believe that death is an everlasting sleep; I am credulous enough to expect an eternity to be, or suffered or enjoyed. If the gentleman will please to turn to the same author on the subject of marriage, his character will be deleniated in colours from which the eye of religion will turn with horror. That person had a personal enmity to Mr. Erskine. The eloquent, patriotic Erskine, the advocate of christianity, had probably excited his malignity against the profession at large.

I did not understand my colleague to sneer at the farmers; I trust that he and I regard them as a highly useful and necessary class of society. I understood his position was this; that the constitution and laws referred to an antecedent system, a perfect acquaintance with which was necessary to understand the nature of the common law and its adoption in Pennsylvania. Allow me to say, sir, that in this position he

is supported by the words of the enlightened and patriotic Wilson, in a letter to the legislature of Pennsylvania, and a lecture which he left as a legacy to his country when death terminated his usefulness. I take pleasure to cite a book of this discription, and I believe it is the first time it was ever cited in a Court of Pennsylvania. No American can read this without approaching to rapture when he describes his attachment to the United States; he also describes in strong terms the dangers we ought to shun. This was on the the 24th of August, 1791. It will probably be recollected that Judge Wilson was unanimously appointed by the Legislature of Pennsylvania to digest their laws. In the 6th page of the Preface, Judge Wilson observes, that "The acts of the legislature of Pensylvania, though very numerous, compose but a small portion of her laws. The common law is a part, and, by far, the most important part of her system of jurisprudence."——"Statute regulations are intended only for those cases, comparatively few, in which the common law is defective, or to which it is inapplicable: to that law, those regulations are properly to be considered as a supplement. A knowledge of that law should, for this reason, precede, or, at least, accompany the study of those regulations."

"To know what the common law was before the making of any statute," says my Lord Coke, in his familiar but expressive manner, "is the very lock and key to set open the windows of the statute."

The common law as adopted by the people and preserved by the people, and no further, forms a noble, important and indispensable part of our system, and without it, until it is supplied, no man can walk from his lodging and find a remedy for insult and outrage. The statute law was considered as a supplement to know what the common law was.

With the permission of this Senate, I will read his elegant compliment to General Washington, and other American worthies.

"In the European temple of fame William Penn is placed by the side of Lycurgus. Will America refuse a temple to her patriots and her heroes? No; she will not. The glorious dome already rises. Its architecture is of the neatest and chastest order: its dimensions are spacious: its proportions are elegant and correct. In its front a number of niches are formed. In some of them statutes are placed. On the left hand of the portal, are the names and figures of Warren,

Montgomery, Mercer. On the right hand, are the names and figures of Calvert, Penn, Franklin. In the middle, is a niche of larger size, and decorated with peculiar ornaments. On the left side of it, are sculptured the trophies of war: on the right, the more precious emblems of peace. Above it, is represented the rising glory of the United States. It is without a statue and without a name. Beneath it, in letters very legible, are these words—"FOR THE MOST WORTHY." By the enraptured voice of grateful America—with the consenting plaudits of an admiring world, the designation is unanimously made. Late—very late—may the niche be filled."*

I thought, sir, that to an American Court, and to an American audience, so handsome a compliment would not be altogether lost.

"But while we perform the pleasing duties of gratitude, let not other duties be disregarded. Illustrious examples are displayed to our view, that we may imitate as well as admire. Before we can be distinguished by the same honours, we must be distinguished by the same virtues."

"What are those virtues? They are chiefly the same virtues, which we have already seen to be descriptive of the American character—the love of liberty, and the love of law. But law and liberty cannot rationally become the objects of our love, unless they first become the objects of our knowledge. The same course of study, properly directed, will lead us to the knowledge of both. Indeed, neither of them can be known, because neither of them can exist, without the other. Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness. In denominating, therefore, that science, by which the knowledge of both is acquired, it is unnecessary to preserve, in terms, the distinction between them. That science may be named, as it has been named, the science of law."

In pages 8 and 9, he answers the question in debate between my colleague and the manager, how far we should be masters of the law.

"The science of law should, in some measure, and in some degree, be the study of every free citizen, and of every free man. Every free citizen and every free man has duties

* General Washington, then President of the United States, was present when this lecture was delivered. *Ed.*

to perform and rights to claim. Unless, in some measure, and in some degree, he knows those duties and those rights, he can never act a just and an independent part."

The study of the law therefore is more or less the duty of every man who wishes to be serviceable to his country; and the next section applies to this subject and shews that at least a partial knowledge of law is within the reach of every man.

"Happily, the general and most important principles of law are not removed to a very great distance from common apprehension. It has been said of religion, that though the elephant may swim, yet the lamb may wade in it. Concerning law, the same observation may be made."

Sir, I generally select my guides from books of this description, uniting the love of liberty and law.

I hope I shall come forward in the argument of this cause without suffering under a prejudice against the Judges or the profession of the law; it is prejudice alone that I fear, which sometimes steals imperceptibly on the most honest mind. The publications read from the Gazette of the United States and other newspapers of Philadelphia, meet my most decided disapprobation. The judges, though held up for a long time as objects for the finger of scorn to point at, have observed, in this respect, a perfect propriety of conduct; not a word, not even their memorials, have been published with their privity and consent. Even those I believe have been deposited in your hands and have never seen the light. It was mentioned that there was a similarity between some of those publications, and the language of the judges in their memorials; and that among those who had signed some of the publications was the nephew of the chief justice. Sir, there are no grounds to infer from this, that the judges knew of any contemplated publication. I am confident that they never knew directly or indirectly of any thing of the kind.

We were informed that a gentleman of the bar had written certain strictures on the conduct of the legislature. While, sir, on the one hand I do not attempt to advocate any of those strictures, not having read the book in which they are said to be contained; yet I do say that the acts of the legislature of Pennsylvania are open to the investigation of the strictures of every person whatever. But strictures on the constitutionality of acts of the legislature, taking away trial by jury, are compared to publications against parties to

private suits depending in Courts. Where is the analogy? I cannot discover it. However the 7th section of the 9th article of the constitution gives the right of investigating the acts of the legislature. "That the printing presses shall be free to every person, who undertakes to examine the proceedings of the legislature or any branch of government: and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

Why, sir, was the case of Judge Brackenridge introduced? I should not have thought myself at liberty to mention it; but it is now fairly open for my observations on my part, as it has been introduced by the manager. Sir, I hope and trust that this trial will give an opportunity of removing those prejudices against the judges as well as the profession of the law, which have been so zealously advanced. The more minute the examination is, the more favorable the result will be. Compare the proceedings of the Courts of justice in the cases of contempts, with that proceeding to which the manager has alluded: In a case of contempt an affidavit is filed in the first instance, afterwards the interrogatories, and a full opportunity given to the party of exculpating himself. Was this the case with the judge to whom the manager has referred? Was he even allowed a hearing? Was there not a risque of his salary and office? Was not his reputation put at stake by the legislature of his country? Yet there was no affidavit against him—nor had he the opportunity of interrogatories to purge the contempt, if it was one. No, sir, not even the opportunity of being heard. Is there any trace of law or gospel for this? Yet it seems that his name is to be transmitted to posterity with disgrace, and he is to be left destitute of the means of subsistence, by a vote, which, like the lightning of Heaven, strikes before the noise of the thunder is heard;—without any warning;—without giving time to seek for shelter from its destructive blast. And all this, sir, is for a constructive contempt against the House of Representatives.

Here Thomas Passmore whose offence finds no advocate; whose publication must excite disgust and horror in any man who peruses it; his sentence alone, for so criminal an act, is made the ground of an impeachment. He is fined fifty dollars, and suffers an imprisonment of thirty days—but he has had a full hearing; even after he answers interrogatories, delay is given for accommodation, and after that, because he

is obstinate and sentence is passed upon him, the judges are impeached. By what refinement,—surely not by "sophistry,"—by what rule can the decent, the respectful, the earnest memorial of the judges to the legislature, requesting a speedy public trial, be construed into a contempt? I must confess, sir, that I could not have thought it possible that the memorial of the judges, soliciting an opportunity of restoring themselves to the confidence of their fellow-citizens by doing away foul imputations upon their honor, should be considered contemptuous, because it spoke of a mutilated record, and the unfounded representations of an offender against the laws. We have heard pages read from Hume to remind this Senate that Bacon, one of the greatest and brightest stars of the law and the ornament of mankind, had soiled his hands with a bribe. You have heard the sentiments of Mr. Hume and of the manager. It would not, perhaps, be fair, to oppose British books to sentiments of this kind; but when I can bring a foreigner, a Genevan, a gentleman well known in the United States, in which the sentiments of my learned colleague are confirmed in the strongest terms, I think it my duty to do it. When speaking of the administration of justice in England, he says it is as pure there as in any part of the world. He thinks the system better adapted to republican government than to any other. [*De Lome, page* 266.] This is a work written before the independence of the United States. In page 311, of the same work, the observations on this subject are continued.

In order to shew the manager how little ought to be inferred from his statement, relative to bribery, and how far single cases would effect general systems, give me leave to ask him, if he has never heard of a legislature being bribed? Is he a stranger to the Yazoo business? Was not a law passed on that occasion by which the records were publicly burnt with every possible mark of indignity, and every trace expunged from the public records of the State of Georgia? Has he not seen Mr. Randolph's speech, in which he says, that this law was not the law of the land, and that it would be contrary to justice to put them into possession? Would the manager think it fair reasoning to infer that therefore the acts of this legislature are to be disregarded? Has calumny itself ever dared to insinuate that the Judges of Pennsylvania have soiled their hands with the touch of a bribe?

The English history presents periods when the spirit of liberty ran high; other seasons when rank prerogative oppressed the subject. We ask no respect for British precedents, except those which have stood the test of years, the

test of the revolution and the halcyon days of the commonwealth.

Is it the measure, or the men by whom it is exercised, that gives so much offence? Let us look at the case of Mr. Hopkinson. This case is directly in point; it is as strong and decisive as if it had been made for the purpose of strengthening our cause. An attachment actually issued, Mr. Hopkinson was taken into custody, and brought here for a constructive contempt of the committee of grievances. Let me not be misunderstood; I mention it not as matter of censure or complaint, but as argument and evidence of the law. I say they have that right. It is necessary—it is inherent—and they ought to exercise it on all proper occasions. But if the manager is correct, I ask how they became possessed of this power? Where did the committee of grievances get it from? From the House of Representatives. Whence do they derive it? Because to give it they must first possess it. By what means do they reconcile it to the constitution; especially as it was not a contempt committed in the view of the committee? I wish the manager had told me on what ground the right was vested in the Legislature and not in the Courts; for unless the gentleman can prove that to be the case, all the arguments of himself and those of the learned counsel must totally fail. The gentleman may say, "it was apparent that Mr. Hopkinson by his non-attendance meant a contempt;" and I may say, in return, that the sobs of my bosom, and even my silence may be construed into a contempt. But I repeat that I wish to know the authority upon which the committee of the House of Representatives sent the attachment for Mr. Hopkinson. Is it not inconsistent for them to claim it for the House and deny it to the Courts of justice.

The manager has exerted himself in explaining as to the informality in the service of the subpœna, about which I have nothing to say. I want to investigate the principles, and if possible, throw such light upon the subject as shall lead to a proper conclusion. In my opinion the time would have been better employed in shewing the legality of the measure, on general grounds: This he must do, otherwise all his pathetic declamation recoils upon himself.

Suppose Mr. Hopkinson had been committed, and an *Habeas Corpus* had issued. How would the committee of grievances have justified themselves? Has the gentleman never thought of this? I recommend to him to pursue the enquiry; he may depend upon it that the advantage of the search is worth the labor.

The constitution says expressly, that no man shall be deprived of his liberty except by the judgment of his peers or the law of the land. It must then be justified, if at all, by the law of the land. Has any act of Assembly been passed giving such authority to the House of Representatives or their committee? Never. If there had been, it would not obviate the objection; for I hold with my honorable friend, that an act of Assembly or Congress, passed in violation of the constitution, is no better than a blank paper.

I shall however dissent most fully in one respect, that is, that "*the law of the land*" refers to the acts of the legislature. There was no act of Assembly referred to at the date of the constitution of 1776. It had a general reference to the common law—and not to the acts of the legislature. There has been no act of Assembly since that period declaring that those acts were meant by that expression. If this was conceded, it would be establishing a principle inconsistent with the constitution.

As the worthy manager has not condescended to tell us where the House gets this high and important power, let me therefore tell him. It may be said that the House possess the power, because it is indispensibly necessary—that they cannot be without it. This will not do, if it is contrary to the constitution. It cannot be obtained but through the medium of a convention, to form a new constitution. And to say that it is inherent, is only saying the House has it because it has it. It is only multiplying words without adding ideas. But if it is necessary for the House of Representatives is it not necessary for the Courts of justice? I contend that there is more necessity for such a power being vested in a Court, than in the House of Representatives. The true ground of that authority in the legislature is this; before the revolution the House of Representatives had the power and did exercise it, not only in cases of immediate but in cases of constructive contempts; as for instance in the cases of Doctor Smith and Mr. Moore. But still how did they get that power before the revolution? Why it was in imitation of the British House of Commons, who have it by the law of the land—a part of the common law adopted by the government—the same common law that is adopted by the good people of the Commonwealth of Pennsylvania.

If this power does exist in the House of Representatives, and if they can vest it in a committee, would they like to have their proceedings so rigidly examined, and so critically measured. Would they consent to be governed by the most minute and trifling lights and shades; or would they alter

the nature of the authority in one instance, and allow the full exercise of it in another. If this principle was to be adopted, some ingenious person, on consideration, might select some circumstances, that would lay the whole fabric in ruin. I trust, sir, that the House would be governed by the good old rule, "*do as you would be done by.*" I shall prove to you that the Judges have this power, and that they are not subject to an examination for the exercise of it, unless intentional error appears to have been committed, nor are they liable to a criminal prosecution in any Court whatever, unless corrupt motives, and wilful violation of the law appears to have influenced their conduct. In the 4th section of the schedule to the constitution of 1790, it is said, "that justice shall be administered in the several counties of this State, until the period aforesaid, (the third Tuesday of December, 1790) by the same justices, in the same Courts, and in the same manner as heretofore."

In order however to shew that the power claimed by the Court is monstrous in itself, derogatory to the honor of the Commonwealth and dangerous to the rights of the citizen, the manager has tortured the idea of my learned friend, so that the Court is said to possess a power, at present, to introduce British statutes and to make them the law of the land. I cannot but regret that the discourse of my worthy colleague, which the manager has justly deemed so eloquent, should at the same time have been so wonderfully misunderstood. How it was possible that the argument and the case he cited should have been so entirely misconceived, I am utterly at a loss to conceive. [1 *Dal. Rep.* 74. *See Appendix, note* E. E. *page* 40.] Here is an instance of allowing an alien to be tried *per medietatem linguæ*, agreeably to the statute; but will it be supposed that our then chief justice, now chief magistrate, would have attempted to introduce laws at that period, without proper authority; for he knew his duty and would not deviate from its path. No, sir, the statute had been in force before; and not being altered by the legislature, it was a part of the law of the land.

Here, sir, allow me to take occasion to say a word on the common law. In England the common law is the only law that is founded on the consent of the people. The statute laws in England cannot be said to be founded on common consent, from the imperfect representation of the people in Parliament; but the common law is founded on the consent of the people at large, the freeman as well as the freeholder; it is like the law between farmer and tenant, or what is called the *say-going crop*. It is the law of the land to the poorest man as well as to the richest. As to the common law the people of

England have common rights, sacredly preserved; but as to their voting for members of Parliament, their restrictions are very narrow indeed, and in my opinion, most unreasonable.

In the first place we are to understand, when we speak of the law of the land, what has been made law, either by acts of Assembly, by judicial decisions, that have been acquiesced in, or by usage of the people, prior to the 4th of July, 1776. As to laws made by the people, or established by the Courts, the Judges of the Supreme Court were not only at liberty, but they were bound to comply with their provisions and to follow precedent; this was not a matter of choice, but a suitor had a right to demand it.

The sentiments expressed on the trial in Mr. Blount's case do not bear at all on this case; nor is there any inconsistency in the sentiments expressed by my colleague on that occasion; for our argument is, that the common law of England is not a common law for the United States, as a general federative and republican government, but a law incorporated into the States respectively, so far as they have deemed it applicable to their circumstances, and as such have adopted it. With regard to the period to which the manager alludes when the feudal system was in operation in England, it does not apply, because it never has been in force in this country. The common law as adopted in this country has nothing to do with feudal establishments. It is intended to preserve the liberty and not to destroy the equal rights of the people. If it was necessary to shew that the severe punishments in England are not authorised by the common law, but are all the offspring of the statute law, I could readily do it. I could shew that the punishment of death in all commercial countries arises not from the common law, but from express statutes.

Much ingenuity has been used to shew that my colleague was mistaken as to the causes of the American revolution. The causes of that revolution were stated to have been questions of principle, arising out of the extravagant claims of Great Britain over this country, and that the opposition began without waiting for the exercise of actual oppression. Can any representation be more honorable to the American character in idea, or more correctly true in fact. I trust they are not censurable because they did not wait till they were trodden in the dust. In order to contradict this representation, the manager cited proceedings which were subsequent to the ravages of war, commenced by Great Britain and carried on with burnings, massacres and wanton destruction. No sir, the undue attempts on the part of Great Britain to tax this

country, began in 1764. This first alarmed the independent spirit of the people, and their opposition was never afterwards laid aside. The first Congress met in 1774, and laid the foundation of the resistance that succeeded. They did not wait until tyranny had actually reached them; but to use the metaphor of the sublime Mr. Burke, they "snuffed its approach in every tainted gale," and determined upon resistance before it was too late. I will read Doctor Ramsey's sentiments on this subject; it is not important otherwise than to remove prejudice.

Ramsay's History of the American Revolution, vol. 1. p. 113. "They commenced an opposition to Great Britain, and ultimately engaged in a defensive war, on speculation. They were not so much moved by oppression actually felt, as by a conviction that a foundation was laid, and a precedent about to be established for future oppressions. To convince the bulk of the people, that they had an interest in foregoing a present good, and submitting to a present evil, in order to obtain a future greater good, and to avoid a future greater evil, was a task assigned to the colonial patriots."

I have found in this authority, very nearly if not precisely, the sentiments of my colleague.

I will now proceed to what I think more particularly concerns the merits of the cause. There was, I think, a hint introduced by the manager, as to the manner in which the event of this trial might operate on a future election. To this my colleague has very properly replied; for I trust, sir, that this trial is not to be considered as a political speculation—that party considerations ought not, and will not find admission into the minds of any of the members of this Senate. I am confident they will do their duty regardless of the consequences of an election. I agree with my learned antagonist that if the Senate find no cause for condemnation, the acquittal of the Judges will be received with as much approbation, if not more, than their conviction would if they were guilty. It would, as the gentleman has observed, be more to the honor of the State.

A paper was read as the opinion of Mr. Lewis, on one of the points. We called for the reading of the whole of it, and also read it with another joint opinion of Mr. Lewis and Mr. Levy, in which it is stated that they see no ground for an impeachment of the Judges. We did not bring forward the opinion of Mr. Lewis. It was brought forward on the part of the managers; let it weigh on one side as well as the other; and we find that we have the united opinion of Mr.

Lewis and of Mr. Levy, decidedly in favor of the cause we advocate.

Adjourned.

SAME DAY, *P. M.*

Mr. INGERSOLL—in continuation.

Mr. Speaker and Gentlemen of the Senate,

I hold in my hand a letter and opinion, brought forward and exhibited as evidence in support of this all-important proceeding. I have heard my learned antagonist declare his inviolable attachment to trial by jury, which he would not have taken away even where the life of a sparrow was depending. If the honorable Senate will attend while I examine this letter and opinion, which was first introduced by the opposite counsel, they will say that it was evidence disproportioned to the magnitude of the proceeding, and not sufficient to effect a sparrow, or even the smallest feather in the wing of a sparrow. The person who obtained and preferred this opinion, knew that his counsel was conversant with all the proceedings; knew what had been, and what had not been done; and was fully apprised of the true state of the case. Application was made to the same counsel, who met and conferred with Mr. Hopkinson. When Mr. Levy came in, and found them furnished with a mutilated statement of the case, he expressed his surprize, and if I am not mistaken, he turned to Mr. Passmore and said, you know that this is not an exact representation of the case; you must know that you have exhibited a mutilated statement of the proceedings.

I will now, sir, proceed to read Mr. Lewis's letter on which the gentleman appeared so confidently to rely:

"*Feb. 19th*, 1803.

"SIR,

"I have carefully perused, and attentively considered the papers which you laid before me, and am of opinion,

"That it is not adviseable to issue an execution on the judgment entered in your suit against Andrew Pettit and Andrew Bayard, since it is *so very exceptionable on the face of the proceedings, as to render it doubtful, if it can be legally considered, as any judgment at all.* It appears, that the matters in dispute were referred under a written agreement, to Matthew Pearce and Hugh Henry, *jointly*, with a power to any attorney to confess a judgment for such sum as *they* might find due; instead of making a report themselves, they chose William Haslett, and he and one of the referrees without the concur-

sence of the other, made the report, and Simpson Levy, esquire, entered a judgment thereon.

"It is therefore, I think very clear, that the report was made by persons altogether unauthorized by the rule of reference, and that *the judgment was entered without any legal authority for doing it.* It follows, that the report cannot be considered as a report by the referrees in the cause, and the *judgment entered upon it* without authority, is a *mere nullity.*"

I trust, sir, I proceed on conceded ground when I say that this was the very principle upon which the Judges decided that the judgment did not put an an end to the action. If I had been supplied with pen, ink and paper, for the purpose of inserting what I pleased in this letter, I could not have written any thing more pointedly than this is in favor of our argument.

"From the facts stated to me, and which you tell me can be proved, I incline however to think, that the report may be established *as an award by arbitrators*, in an action brought for the money.

"For the reasons which have been mentioned, I think *the judgment did not put an end to the action*, and *that it was depending* at the time of your publication on the 8th of September last. If so and if you had a knowledge of it, that publication was certainly *a high contempt*, for which an attachment might legally issue, and *punishment be legally inflicted.*"

I now come to the part relied on by the manager:

"But I think your answers to the interrogatories entitled you to a discharge from all further proceeding under the attachment, however they might subject you to a prosecution for perjury if they were intentionally untrue."

This is the evidence offered by the manager. I will proceed to read the remainder of the letter.

"I take it to be the clear and settled law, that in all cases of proceedings by attachment, "if the party *fully purges* himself upon oath in answer to the interrogatories of *the whole matters charged* upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit." 2 *Hawk. P. C. cap.* 22. *s.* 1. In the case of the Commonwealth v. Oswald for a contempt, [1 *Dall. Rep.* 328.] the counsel in support of the prosecution said, "It is incumbent upon the person who sup-

gests the contempt, to prove it by disinterested witnesses, and then the defendant is allowed by his own oath to purge and acquit himself; in spite of all the testimony which can possibly be produced against him. The Court employ no compulsion in this respect. He may either answer or not as he pleases. If he does answer, his single oath in his own favor, will countervail the oaths of a thousand witnesses." On which the then chief justice M'Kean said, "your statement is certainly right."

"According to the best judgment which I am able to form, your answers to the interrogatories were full as to the matters charged against you, by way of contempt.

"That you were *mistaken in your belief of the suit being ended*, is I think pretty clear; but whether you were mistaken or not, or whether you testified truly or not, could only be be inquired into in a prosecution for perjury, and not in a proceeding by attachment.

"What circumstances or what points were brought before the Court, I do not know; but if a full disclosure with the proper grounds of defence were made, it appears to me that you ought to have been discharged, and the prosecutors left to proceed against you for perjury, if they supposed they had any ground for it. If you wish me to consider, whether the judgment can be reconsidered, either in the same Court, or in a higher one, I am willing to do it, but as I have already told you, *there is certainly not the least ground for any thing beyond this.* That the *Judges acted as they believed to be right, cannot be doubted by any person, who is at all acquainted with their characters, and general conduct; and the supposition that a judge is answerable for a mere mistake, is altogether inadmissable.* That you acted in like manner in answering the interrogatories, I have no doubt is equally true, although it appears to me that both they and you have been wrong.

"Your most humble servant,

"W. LEWIS."

"Mr. Passmore."

That this might be considered as evidence against the prosecution is matter of much doubt; but that it can be considered in support of it, on a criminal charge is beyond my apprehension. But on evidence such as it was, the grand inquest of the Commonwealth have preferred articles of accusation and impeachment against the Judges of the Supreme Court. It is not necessary to consider the evidence on which it was supported; but if it appeared to them to be sustained

by testimony it certainly was their duty to bring it forward. The article states that a sentence of fine and imprisonment against Thomas Passmore, "*under all the circumstances of the case*, was arbitrary, unconstitutional, and a high misdemeanor, for the five following reasons." I confess I do not understand this charge. Is the constitutionality of the power conceded generally, and exception taken to its exercise in this particular instance? An accusation of this kind ought to be perfectly clear, explicit and free from ambiguity. However we meet this and their reasons most chearfully.

The first reason is, "Because the publication did not reflect on the Judges in their judicial capacity nor personal character." The second, third, fourth and fifth, states that punishment was inflicted, not for a contempt of Court, but because he would not make atonement; and so it concludes, without alledging any corrupt motives. There is no direct assertion, then, in those reasons; there is no charge there against the Court for exercising a power which they did not possess; nor do the House of Representatives call in question the power and authority of the Court. I refer to the report of the committee upon which this article of impeachment was founded. I think we shall find that it was founded on a record, which did not give a true statement of the case, or was not carefully examined. It may very probably have happened that the information may have been incorrect. The report reads thus. *See pages* 10, 11, 12 *and* 13 *of this book.* This is the manner in which it is charged in the report of the committee of grievances of the House of Representatives.

It will appear that the agreement of the 12th of July did not authorise the choice of an umpire, but that the agreement of the 13th of July did authorise the choice of an umpire, in case of the referees disagreeing; but this appears without the signatures of Messrs. Pettit and Bayard. The first agreement could only be superceded by the signatures of Pettit and Bayard to the second. Sampson Levy swears that he either told Passmore, or that Passmore told him he would call on Messrs. Pettit and Bayard and procure their signatures. It is not possible to confound the agreements of the 13th and 17th. On the 17th of July another agreement was prepared, in case it should appear that the brig Minerva was a rotten ship, not fit to risk the lives of seamen on, and that an additional premium had been given to the other underwriters to ensure her under those circumstances; but this important fact does not appear on the face of the record; therefore the principal and leading feature, so far, fails in the very treshold. The agreement of the 12th of July, was the only one that could legally bind the parties.

In the next place they have charged the Court with proceeding differently in this case, from what had been the usual practice. With regard to this charge, I will only observe that it is contradicted by the testimony of Mr. Keeble on the part of the prosecution, and that of Mr. Moses Levy on the part of the respondents. If the learned counsel for the managers will only take the trouble to look at the evidence, he will find that the expressions of the Court, that Passmore had been guilty of a contempt of Court, were not made till after the acknowledgment of the publication. It was then and not till then, that the Court used the expressions; and this was after it was conceded in open Court, that he was the writer of the libel on the characters of the two gentlemen. In that situation was the business, when judgment was called for by Mr. Dallas. If we are right, it is not the duty of the prosecutor to exhibit interrogatories; it is in the election, or not, of the libeller to ask for them. If the proceeding was at all different from the usual course of proceeding, it was that it was the milder and more favorable to Passmore of the two. That this mode of proceeding, of considering the private injury with the public good—that this is the course of proceeding now practised in England, and that it has been the rule in that country ever since the year 1619, is proved from *Scriven* 296-7. I read only a small portion of this case in order to establish the point of the mode of practice. So far as taking it before the commencement of our revolution, we have traced it to 1619. As it may save time in another part of the argument, I beg leave to read an additional paragraph from another book. [2 *Black. Rep.* 1110. KING *vs.* HALL. *See Appendix, note* L. *page* 19.]

I proceed then, sir, to state two questions under which I shall class my arguments.

First. Had the Judges a power by law to punish Thomas Passmore for the publication of the 8th of September, 1802, as a contempt of Court, by the process of attachment?

Secondly. Have they exercised this authority in a way that was unconstitutional, or in a cruel, arbitrary and tyrannical manner?

Upon the facts the law arises. I will advert to the evidence and endeavor to ascertain with precision, the circumstances of this most extraordinary case. On entering on this part of my duty, I beg leave to request of the Senate, the manager and the counsel, that if I mistate a circumstance of the evidence, I may be instantly interrupted. I will not complain, but return to the path I shall have left, and kiss the rod that corrects me.

The first object that presents itself in the course of the evidence, is the publication of the 8th of September, 1802. That publication it is acknowledged, speaks of Messrs. Pettit and Bayard in the grossest terms that are possible—it represents them in the most despicable point of view, and is calculated to injure their credit in society, and this at a time when the dispute relative to the judgment was undetermined. But still we are told that it cannot be a contempt of Court, because there was no action depending at that time.

I will now refer to 1*st Pere Williams*, 675. [*See Appendix, note* R. *page* 24.] and I shall shew that there is no necessity for the action to be then actually pending, if it has been in Court, and that if it appears on the face of the proceedings that the Court could reasonably grant a new trial, which might be affected by this publication. [reads] In that case, sir, there was not a word in the paper itself suggesting that the action had been depending in the Court of Chancery, or in any Court whatever. But, sir, with respect to Thomas Passmore's publication I will clearly shew that it did relate to the matter depending in Court, and that it falls under the denomination of a contempt, because it was calculated to prejudice the public mind and thereby to obstruct the administration of justice. It begins by bestowing upon Messrs. Pettit and Bayard the epithets of quibbling underwriters, thereby referring at least to the subject matter in Court. It then by refering to the affidavit, made on the 3d of September, before Mr. John Inskeep, then an alderman, declares that the exceptions which were filed and awaited the judgment of the Court were not true. By comparing the exceptions to the report of the referrees with the affidavit of Andrew Bayard, I believe they will be found to correspond exactly; and it does not appear that any other affidavit was taken at any time by Mr. Bayard before Mr. Inskeep. Passmore therefore could refer to no other, and that related to the suit in Court. He himself draws the inference when he says, "by *which* the said Pettit and Bayard are enabled to keep the subscriber out of his money, for about three months longer." Saying that this is done by the affidavit, is the same as saying it is done by the exceptions. When you refer to the affidavit, you refer to the exceptions also. I believe this Court must be fully satisfied that the publication refers to the affidavit of Mr. Bayard taken before John Inskeep, esquire, alderman. This is so clearly apparent that I shall not take up the time of the Senate in supporting it. Passmore himself in his answers to the interrogatories acknowledges that he referred to the exceptions which were sworn to by Mr. Bayard. It will be found, by refering to the record what was the matter and question to be decided by the Court in the case of Thomas

Passmore against Pettit and Bayard. This was whether the exceptions were true or false; and this is precisely the point on which he undertakes to prejudice the public mind, by publicly declaring that they are false.

Now let us look at the very head of the exceptions and affidavit. There we find "*Thomas Passmore versus Andrew Pettit and Andrew Bayard;*" it is then a necessary consequence that refering to the exceptions, refers to the action, and thus Thomas Passmore explained to Mr. Hennessey, "that he meant to refer to the exceptions." So that by his own confession, not imparted in confidence or with an injunction of secresy, but told without reservation, to one or more, it appears that he did allude to the exceptions, and consequently to the action.

Does it still remain to be discovered, whether there was an action then depending in court? Thomas Passmore, in his answers to the interrogatories, admits that an action had been instituted, and refered; that an award had been made in his favor, that there had been a confession of judgment and an execution; and that exceptions had been filed; but that he considered them as null and void.

It is plain that he refers to this particular action, for in that very case he refers to the affidavit, which forms a part of it, and by which he expressly refers to the exceptions. I should suppose that these circumstances are sufficient to satisfy this court that there was an action then depending in court and that Thomas Passmore knew it.

To obviate this difficulty, Thomas Passmore, on his examination before the committee of grievances, on the 9th of February, 1804, swears, that after he thought the action was out of court, it had been brought into court again by the judges, as he supposes, to answer their own purposes. Now, sir, let us refer to the written declaration of Thomas Passmore to ascertain if he did not know that this action was depending on the 8th of September. We shall find no proceeding as to the exceptions, previous to the 6th of Sept. and I believe the court adjourned to the 18th of Sept. Whatever was the situation of the business between the 6th and 18th of September, was precisely its situation until December. Now, sir, I hold in my hand what I call a written declaration of Thomas Passmore that the action was then depending; because, as I said before, not a single circumstance took place between the 6th and the 18th of September which could in any manner effect it. On the 6th of September, the court will please to recollect, Mr. Passmore takes a rule for the purpose of taking the testimony of witnesses in support of the awards of the referees, by himself or council. This amounts to

a full declaration on his part that he knows the action to be in court. From the 6th of September until the December term following, when it was placed upon the argument list, not a single particle of it was altered by any transaction whatever. On the 13th of November, 1802, Mr. Levy gives notice to the other counsel employed in this action, that it will come on for argument at the next term; treating it fully and fairly as an action depending in court. [Here Mr Ingersoll read the notice of Mr. Levy.] How this notice was served I do not know, probably by Passmore himself; and yet, informed as he must have been by the rule of court, taken out on the 6th of September, as well as by this, Thomas Passmore has sworn that to the best of his judgment and belief there was no action then pending.

I go back to an intermediate period, and I state with perfect confidence precisely the same opinion, that he must have known that the action was pending. That he considered it as such, is fully apparent when he states:

"*Levy, S. Levy,* 264 *M'Kean.*	*Thomas Passmore* versus *Andrew Pettit & Andrew Bayard.*	*In the Supreme Court. Amicable action case. To Sept.* 1802. *August 6th,* 1802. *Judgment.*

"I do hereby acknowledge and declare, that the above action is for the use of John Travis, of the city of Philadelphia, merchant.

"THOMAS PASSMORE.

"*Philadelphia, October* 26, 1802."

Thus does he speak of it, not as a claim, but as an action; not as a claim or demand, but by the express words "an action." More, sir, if more is necessary to be said, on a matter so perfectly clear.

On the next day, I believe it was, that Passmore went to the office—it was on the 27th of October, 1802, that he went to the office of the prothonotary and made the entry. Mr. Passmore, by his writing filed in the office at that time, declared that this action was still pending. Shall I take up the time of this court in establishing whether there was an action depending or not, when we find the action progressing without any interruption whatever, under the acknowledged view of Mr. Passmore.

When exceptions are taken to an award, returnable into office, they are, by the practice of the court, to be filed within four days or the report of the referees becomes a judgment. But here the exceptions were filed in due time, and the consequence was evident, that the variance between the rule of reference and the report of the referees would support the exceptions and prove fatal to the judgment.

This rule of proceeding, we had it in testimony, from Mr. Levy and the attorney-general, is in effect a rule to shew cause; and from the moment exceptions are filed, they must remain until they are disposed of by the court in which they are filed. No evidence can be more conclusive. On the 6th of September Passmore knew it, and I am not asserting this from what has been said or done by others; but he himself took a rule for taking the depositions of witnesses in support of the report of the referees: But to put the thing beyond all question, if we turn to the record of the supreme court, we will find what is termed, in legal language, an absolute verity; that the action was not only pending, but remains to this day to be decided by a jury, and Thomas Passmore knew very well that the records of the court would have told this, and he knows that if a suit is once instituted it must be continued until finally settled. For instance, a man obtains a bond and warrant of attorney by violence or fraud; he enters it, and obtains a judgment. The defendant files his affidavit—moves for a rule to shew cause why the judgment should not be set aside—he goes on in the orderly and regular course of proceeding. The plaintiff publishes in order to impress the public mind with favorable sentiments respecting himself, and to asperse the reputation and cause of his antagonist. It does not avail him to say, I knew that an action had been instituted and a judgment obtained and entered up; he also knows that a motion has been made for setting aside that judgment. But there being a judgment entered up, consequently the action was at an end. No, he is obliged to know that there was and is a dispute between them, and that though there was a judgment in his favor, it was improperly obtained, and therefore it is no termination of the action.

We have heard it asserted that common sense was preferable to common law.—Sir, the common law is founded in common sense, and common sense tells us that the conduct of Thomas Passmore could not be tolerated. I will refer to the very words of chief justice M'Kean, used by him in Oswald's case. [1 *Dal. Repr.* 325. *Respublica* 11. *E. Oswald.*]—*(See Appendix, note U u, page* 58.*)* "If then the liberty of the press," &c.

If a man was to go to the prothonotary's, and obtain, by some means or other, an execution against me; I am obliged, perhaps, to go to prison—and when I undertake to seek redress for the injury, and state certain irregularities which he must have been acquainted with at the time he committed the injustice; he says "true, I knew that this was not regular; but the prothonotary granted me the execution." Sir, would this serve as an apology? No, sir, it would not. The law does not turn upon quibbles of this kind, but upon the broad principles of justice.

It would have been enough, if there was no action, if there was only a dispute between them ; and Passmore well knew that the execution had been irregularly obtained, though he contended that the exceptions were out of time. Pettit and Bayard contended that they were within time,—it was to be decided by the court, whether true or untrue, and it is wisely provided that, when such questions are depending before a court of justice, there shall not be any publication that can possibly affect the merits of the case.

From the strength of reasoning and extent of the argument of my learned colleague, I was almost induced to hope that it would have been sufficient to satisfy the minds of this honorable court, but I am compelled by the observations which have fell from the opposite side, to occupy a portion of your time. I, therefore, knowing that the argument will inevitably be long, do not wish to dwell on any part of it, longer than may be necessary to do my duty to my clients.

With respect to the action—whether it was pending or not. As Thomas Passmore was wrong in the event, the court of course were right at this period : Then, sir, I also am right in this particular that the action between Thomas Passmore and Pettit and Bayard was depending on the 8th of September, 1802. That single fact is enough to justify the whole proceeding had against him. Whether he has purged the contempt by his answers to the interrogatories was also to be decided by the court. Whether he knew there was an action depending or not was perfectly immaterial to the question ; he was not to be sheltered because he undertook to exercise his opinion on a matter with which he was not perfectly conversant. But, say the counsel and manager of the prosecution, he ought not to be involved in a penalty, there being ground for him to suppose there was no suit then pending ; that there was only a dispute to be decided by the court whether the judgment was regular or not. I contend there was, in a strict sense of the word, an action then pending, and Thomas Passmore knew it was pending on the 6th of September, when he took out a rule to examine witnesses in support of the report of the referees.

It will now, sir, be in order to establish the power of the court on the law and the constitution, I shall proceed to consider if Thomas Passmore's reflecting,—grossly and infamously reflecting on, and libelling Messrs. Pettit and Bayard as men, merchants and parties to a suit in court, whether the judges of the supreme court had not authority to punish him for a contempt of court.

I observed, sir, that I must in the first place say that this was the rule of practice in England, as far back as 1619. I will af-

terwards inquire how far this common law practice, in cases of contempt, has been adopted as a part of the common law of Pennsylvania. I am aware that I may excite prejudice when I mention the common law. I am also aware that while prejudice exists it will be difficult if not impossible to convince. But I hope we shall be patiently heard and have full justice done to the rectitude of our cause.

I asked this morning, and I beg leave to repeat the question; is this jealousy of the common law, which we meet at the present day, the genuine offspring of revolutionary ideas, or is it the child of a more modern birth, neither owned nor adopted by the American people? Let the constitutions of the several states and the resolves of congress answer these questions. [*Journals of congress, of the 13th of October*, 1774.

"Resolved 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by the peers of the vicinage, according to the course of that law."

"Resolved 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances."

We here find that the colonists claim the common law of England as a great and inestimable privilege, and particularly the right of being tried by their peers of the vicinage; and this great privilege is accompanied with the power of punishing contempts by attachment. These two parts of the common law have gone hand in hand from age to age. The trial by jury is inviolate, and the jury shall go into the box, pure and unsullied, like a sheet of white paper; they must not be previously acquainted with the story of the one and ignorant of the cause of the other; for if it is discovered that they have expressed an opinion respecting the merits of the case, between the time they have been summoned and that of the trial, that circumstance is ground for a challenge, or if not discovered 'till after the trial, the court will on proof being made, grant a new trial. They are not to be biased in any manner, and to prevent this the power of attachment is indispensable. So far, I contend sir, were the patriots of America from being jealous of the common law of England, that they considered themselves as slaves only when deprived of it.

The constitution of the state of New-York, was discussed with great deliberation, and formed with care and caution. It provides, that the legislature shall at no time hereafter, institute any new courts, but such as shall proceed according to the course of

the common law. The constitution of the state of New-York was made when patriotism was in its full flow; when the enemy was in possession of their capital, the city of New-York. [*See constitution of New-York, section* 41.] The constitution was dated the 20th of April 1777, and the enemy continued in possession of the city of New-York until 1783.

In the declaration of independence, I think it is stated as one of the grievances complained of, that the king of Great Britain had denied the free laws of Great Britain to one of the neighboring colonies. As early as 1774, this was the idea entertained and expressed; congress considered trial by jury and the common law power, as inseparably connected. And I shall shew presently that Blackstone was of the same opinion; and I do not at the same time hesitate to say with the learned judge Wilson, that a man who could write so elegant an eulogium on the sacred right of trial by jury could not possibly be an enemy to the liberties of mankind. The ground that common law rules are not to prevail is contrary to the constitution. The principle of common law is there expressly recognised—and previous to the battle of Lexington, which commenced hostilities between this country and Great Britain, in suits at law the courts were to proceed according to the rules of the common law. Even in the courts of the United States, which are qualified to assume the highest tone that can be given by the constitution, provision is made that trial by jury shall be according to common law, not according to rules to be established by congress; they did not attempt to define the process,—to make new rules and abandon the old:—they have been too wise to make so dangerous an experiment.

The ground taken against us is, that the principles of the common law are in direct opposition and hostile to the constitution of Pennsylvania, and the laws made under it. The act for erecting the high court of errors and appeals, passed the 28th of February 1780; not in a time when the revolution might be said to be forgotten, but in the very midst of our revolutionary war, at the very time that the continental money was sinking into waste, when congress thought it proper to call it in. At this time I will shew that we have adopted the common law. [Here Mr. Ingersoll read from M'Kean's laws, page 27—sections 3, 4, and 5, of the act erecting an high court of errors and appeals—where it is declared, "that it is requisite that the good people of this commonwealth, *who have adopted the common law of England*, should enjoy the full benefit thereof, by the erection of a competent jurisdiction within this state, for the hearing, determining and judging in the last instance, upon complaints of errors, *at common law*, &c.;—that writs of error shall be sued "*according to the course of the common law*," and that the judges be empowered to affirm or revise judgments "*as the course of the common law and justice shall require.*"]

This shews that we are correct in stating that the practice of proceeding according to the course of the common law, has been adopted by the people of Pennsylvania. I find, sir, that Thomas Paine, author of the Rights of Man, signed this act as clerk to the general assembly. Although he was only clerk to the general assembly, yet such was his influence at that time, that if he had seen any thing in this act derogatory to the constitution, and had pointed it out, it would have been instantly rejected.

I cannot think it either excusable or proper for me to proceed until I have removed a prejudice which I conceive to exist. A prejudice against the judiciary, which cannot be concealed. Under our constitution, the judiciary is as much the representation of the people, as any body whatever—as the house of assembly itself. It is declared by the people to be a branch of their government. Mr. Justice Wilson, whose work is of infinite value, because it treats in a masterly manner, of our peculiar concerns well deserves to be quoted in support of my doctrine. I do say there is more information to be gained in this single book, with respect to the nature of the laws and constitution of the United States, than in all the European volumes. [1*st Wilson's works* 397.]

" Habits contracted before the late revolution of the United States, operate, in the same manner, since that time, though very material alterations may have taken place in the objects of of their operations.

" Before that period, the executive and the judicial powers of government were placed neither in the people, nor in those, who professed to receive them under the authority of the people. They were derived from different and a foreign source: they were regulated by foreign maxims: they were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust? Need we be surprised, that every occasion was seized for lessening their influence, and weakening their energy? On the other hand, our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes. Every power, which could be placed in them, was thought to be safely placed: every extention of that power was considered as an extension of our own security.

" At the revolution, the same fond predilliction, and the same jealous dislike, existed and prevailed. The executive and the judicial as well as the legislative authority was now the child of the people; but, to the two former, the people behaved like stepmothers. The legislature was still discriminated by excessive partiality; and into its lap, every good precious gift was profusely thrown.

"Even at this time, people can scarcely devest themselves of those opposite prepossessions: they still hold, when, perhaps, they perceive it not, the language, phich expresses them. In observations on this subject, we hear the legislature mentioned as the *people's representatives*. The distinction, intimated by concealed implication, though probably, not avowed upon reflection, is, that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear.

"But it is high time that we should chastise our prejudices; and that we should look upon the different parts of government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them. The character, and interest, and glory of the two former are as intimately and as necessarily connected with the happiness and prosperity of the people, as the character, and interest, and glory of the latter are. Besides; the execution of the law, and the administration of justice under the law, bring it home to the fortunes, and farms, and houses, and business of the people. Ought the executive or the judicial magistrates, then, to be considered as foreigners? Ought they to be treated with chilling indifference?"

In Tucker's Blackstone, in the appendix to the first volume, will be found sentiments confirmative of the idea, that the independence of the judiciary is necessary to the preservation of liberty. It is an American production and does honor to the author and his country. It is an excellent commentary on the rights of the people, and of the utmost service to the rights of the most defenceless part of the community. I cannot but consider myself as justified in tresspassing on the time of the Senate by reading extracts from such an author. He certainly is a safe guide. He possesses an enlightened understanding, and his heart is firmly attached to the people of the United States. [1 *Tuck. Black. Appendix*, 353 *and* 359.]

"But whatever objection may be made to the extent of the judicial power of the federal government; in other respects, as it is now organized, and limited by the constitution itself, by the amendments before mentioned, and by the act referred to, it seems worthy of every encomium, that has ever been pronounced upon the judiciary of Great Britain, to which it's constitution is in no respect inferior; being, indeed, in all respects assimilated to it, with the addition of a constitutional, instead of a legal independence, only. Whatever then has been said by Baron Montesquieu, De Lolme, or Judge Blackstone, or any other

writer, on the security derived to the subject from the independence of the judiciary of Great Britain, will apply at least as forcibly to that of the United States. We may go still further. In England the judiciary may be overwhelmed by a combination between the executive and the legislature. In America (according to the true theory of our constitution,) it is rendered absolutely independent of, and superior to the attempts of both, to control, or crush it: First, by the tenure of office, which is during good behaviour; these words (by a long train of decisions in England, even as far back as the reign of Edward the third) in all commissions and grants, public or private, importing an office, or estate, for the life of the grantee, determinable only by his death, or breach of good behaviour. Secondly, by the independence of the judges, in respect to their salaries, which cannot be diminished. Thirdly, by the letter of the constitution which defines and limits the powers of the several co-ordinate branches of the government; and the spirit of it, which forbids any attempt on the part of either to subvert the constitutional independence of the others. Lastly, by that uncontrollable authority in all cases of litigation, criminal or civil, which, from the very nature of things is exclusively vested in this department, and extends to every supposable case which can affect the life, liberty, or property of the citizens of America under the authority of the federal constitution, and laws, except in the case of impeachment.

"The American constitutions appear to be the first in which this absolute independence of the judiciary has formed one of the fundamental principles of the government. Doctor Rutherforth considers the judiciary as a branch only, of the executive authority; and such, in strictness, perhaps, it is in other countries, it's province being to advise the executive, rather than to act independently of it: thus when Titius demands a debt, or a parcel of land of Sempronius, the judgment of the court is, it's advice to the executive, to whom the execution of the laws appertains, to levy the debt for the plaintiff, or to put him in possession of the lands which he claims, or to dismiss his demand as unjust and ill founded. So also if Titius be accused of treason, murder, or other crime, and be thereof convicted, the judgment of the court, is it's advice in what manner he shall be punished according to law; which advice is to be carried into effect by the executive officer. Or if he be acquitted, the judgment of the court is it's advice that he be discharged from his confinement, and from further prosecution. In this sense it is, that the judges of the courts of law in England are reckoned among the number of the king's councils, they being his advisers in all cases where the subject matter is of a legal nature. But in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government; expressly recognised as such in our state bill of rights, and constitution, and demon-

strably so, likewise, by the federal constitution, from which the courts of the United States derive all their powers, in like manner as the legislative and executive departments derive theirs. The obligation which the constitution imposes upon the judiciary department to support the constitution of the United States, would be nugatory, if it were dependent upon either of the other branches of the government, or in any manner subject to their control, since such control might operate to the destruction, instead of the support, of the constitution. Nor can it escape observation, that to require such an oath on the part of the judges, on the one hand, and yet suppose them bound by acts of the legislature, which may violate the constitution which they have sworn to support, carries with it such a degree of impiety, as well as absurdity, as no man who pays any regard to the obligations of an oath can be supposed either to contend for, or to defend."

"That absolute independence of the judiciary, for which we contend is not, then, incompatible with the strictest responsibility; (for a judge is no more exempt from it than any other servant of the people, according to the true principles of the constitution;) but such an independence of the other *co-ordinate* branches of the government as seems absolutely necessary to secure to them the free exercise of their constitutional functions, without the hope of pleasing, or the fear of offending. And, as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed, or influenced by it's co-ordinate branches, who have the custody of the purse and sword of the confederacy; and as nothing can contribute so much to it's firmness and independence as permanency in office, this quality therefore may be justly regarded as an indispensable ingredient in it's constitution; and in great measure as the citadel of the public justice and the public security."

Having made this attempt to remove any prejudice from the minds of the court, I return to my argument: whether this process by attachment, is any part of the common law in it's adopted form? I shall endeavor to shew that it is common law; not the common law as delivered by Jefferies, whose very name shocks the ear of humanity, but as declared by the judges in repeated judicial decisions, and that this part of the common law is absolutely necessary, to carry into effect the trial by jury.

Accordingly, therefore, I should now proceed to shew by the authoritative evidence of cases, that the court have a power to punish by attachment, and to proceed in a summary manner for publications respecting suits pending in court;—that with the jury or witnesses there shall be no means of communication but through the legal channels. But before I enter on that task,

let us meet it as a question of reason. Suppose there was no law on the subject. What are the reasons for vesting this authority in the courts? Some of these reasons I beg leave briefly to state. It is evident that trial should be by jury, and I am persuaded that the learned counsel for the prosecution, cannot express himself in language contrary to this. A long series of practice has confirmed me in the opinion, that a jury with the assistance of an independent judiciary is the best mode of doing justice; but this mode cannot be carried into effect without the aid of officers and witnesses; and we know that in many cases the witnesses of a man may disregard a notice to attend; then unless the court have the means of compelling his attendance, justice may be frustrated and lost. Give me leave to say, in particular with regard to juries, that it is of the utmost importance that they should be impartial. Is there any man who has ever served as a juror but knows that the jury have to take their seats and do impartial justice between the parties? If a juryman goes into the box previously prejudiced with regard to the merits of the case, you may bring in arguments, produce doctrines and authorities in vain; if a man's mind is previously made up, all that can be said is of no avail; it is therefore highly convenient and necessary that the court should have the authority of preventing the jury from being tampered with or improperly biased. I ask the learned counsel if they can do without it? Suppose a man is accused of murder—a witness is subpoened—questions are asked him, but he won't answer—the trial can't stop—what's to be done for the want of this testimony? The jury may acquit the man though really guilty, or he may suffer innocently, unless the court have the power of compelling the witness to give his testimony, or of punishing him for his obstinacy. If this may happen in the view of the court, how many cases might happen, out of the view of the court, which would as effectually interrupt the proceedings of justice. Suppose a man collects a mob at the court-house while the court are sitting; they beat a dozen drums at once—can the court proceed to punish these men without this authority? Suppose they place a cannon and fire it near the court-house while the court is in session, and though ordered to refrain they still persist in making the noise—how are the court to proceed against them for this annoyance, without this power? In short, there would be nothing to secure the trial by jury if the court did not posses this authority. There is no calculation of security for the rights of the citizen without this necessary power.

In the reports which have been referred to by Mr. Dallas, and which he left for me to read, it is said [*Wallace's reports, page* 80, *Hollingsworth against Duane; also same book, page* 105–6, *United States against Duane.*]

"It is of the last importance that a *party* should proceed in his judicial course for redress, free from any influence but that of the regular and standing operation of the law. His character, his cause, his proceedings, the witnesses, the judges, jurors, and officers should be subject to no extraneous impression, fears, or control. If lawless men, void of decency, and urged on by passion and interest, shall be permitted to vilify and insult judges, jurors, witnesses, and the parties, what must ensue but a total perversion of justice, and indeed almost the extinction of justice itself? Jurors will not serve, witnesses may be made to suppress or prevert the truth, the judges themselves may feel their independence attacked, and the parties and their counsel will be intimidated in their proceedings. To prevent such direful consequences, and to secure to every man the peaceful and impartial investigation of his claims before the tribunals of his country, the law is, that *pending a suit*, it is a contempt of the court to publish either false accounts of their judicial proceedings, or any other matter tending to *influence* the course of justice, *or reflect* upon the persons and parties concerned in its execution."

"If judges and jurors, parties and their counsel, be subjected, *during the pendency of suits*, to the aspersions and unrestrained publications of the press, what, but the destruction of the trial by jury, must ensue? I mean the impartiality, the purity, the independence of that trial. Some men may be found so fortified by nature or habit, as to be above all influence of that kind. But how many honest and honorable minds, will either wholly withdraw themselves from taking any part in the administration of justice, or shrink from the free and unbiassed discharge of their office, if it permitted that they should be held up to the world as degraded, corrupt and infamous. Jurors are not volunteers; they are called here by compulsion of law, and generally give their attendance to the great detriment of their private affairs. They are therefore, more strongly entitled to protection. If they remain unprotected, they will soon learn to dispise the process of a court which will be itself contemptible, and relinquish an inconvenient duty, subjecting them to calumny and disgrace. These consequences will follow in a greater or less degree, with reference to the judges, the jury, the counsel, the officers concerned in returning jurors, and all who may be necessarily employed in the administration of justice. If therefore the trial by jury is to be preserved; if the rights of suitors are to be protected touching their dearest interests, of property, life, or character; courts of justice must prevent all discussions, all interference, or reflections in newspapers, *while causes are depending*. This is equally the privilege and security of both parties; and the support of it is the common cause of every virtuous man in the community. In order to afford complete security, it is absolutely necessary to restrain and punish offences of this kind, in

a summary manner, and in a summary manner they have been punished from the earliest times to the present day."

Is not the principle exemplified. You certainly cannot expect even that counsel will be able to do his duty to his client without this protection. There is certainly a necessity of preventing those obstructions to the administration of justice; but how? Indictment, information or civil action have been suggested. Now permit me to make a few observations on this doctrine. Suppose the interruption to the administration of justice occurred in the supreme court of Pennsylvania. An indictment cannot be found on the criminal side, as the supreme court have no grand jury. The judges of the supreme court I suppose are obliged to submit to the indignity in patient silence. The same reasoning applies with greater force to the register's and orphan's courts, where no actions are brought, but where such propositions are settled as require no jury at all. Upon such terms the courts of common pleas could not punish the most flagrant contempt against its authority, as they are also without a grand jury.

A circumstance occurred in Philadelphia, some time since. Two brothers were connected in business very extensively—one of them died—the whole of the property came into the hands of the survivor, who became exceedingly embarrassed, and was about to take the benefit of the bankrupt act—on this, application was made on the part of the widow and children to the orphan's Court, and he was immediately called upon by process of attachment, either to do justice to the widow and orphans, or be punished. The result was, that security was given for the money, and the widow and her children saved from penury and distress; and nothing else but the exercise of this power, which conveyed the terror of immediate commitment, enabled the orphan's Court to redress the injuries of the widow and orphan. I here put the question: Would the injured party have obtained the same justice had he been proceeded against by indictment, information or civil action? Certainly not.

I ask the gentlemen to shew me a precedent, where any person has been indicted for a contempt. If a contempt is committed it must be punished in the same Court in which it is perpetrated. Then how could the Supreme Court punish a contempt by indictment? Why, say the gentlemen, this can be ordered so that the Court of quarter sessions can proceed against the offenders by indictment. This is strange reasoning indeed! The Supreme Court to be dependent on the inferior Courts for protection! I repeat it, that an indictment is proper for a libel, but it is impossible to indict for a contempt—Will an

information answer the purpose? No; that is intended by the constitution to be restricted to officers for misdemeanor. It is limited to particular cases which are enumerated. I know not by what process justice is to be obtained, but by the process of attachment, in cases of consequential as well as direct contempts of Court. The Court of Common Pleas and the Supreme Court have no grand jury, and the Orphans' Court proceed without a jury of any kind.

As the committee of grievances, and I believe the House of Representatives also, seem willing to concede that in regard to contempts committed in the face of Courts, the summary process is a necessary power, and that the Courts are vested with it: Whatever doubts may be on the minds of gentlemen with regard to the mode of proceeding, I think the distinction is perfectly clear between a contempt of Court and a criminal case; the constitution directs, that in all criminal cases the offender shall be proceeded against by indictment; but makes no provision for the speedy punishment of offences of this nature, which are therefore left to be punished according to the common law. If a man strikes the chief justice and drives the other justices from the bench, if he was to be proceeded against by indictment, all they could do would be to make him give bail; or if it is not a matter of indictment but to be proceeded against by information, he may strike as long as he can repeat the blow.

With respect to contempts there must be some rule of general construction. Mr. Justice Blackstone, in the passages cited by my colleague in the first instance, and by my antagonist in the second, says that the reason of the law shews its extent; at the same time that he is the firm advocate of jury trial, he also lays down clearly as an essential appendage the summary process by attachment. Judge Tucker does not suggest that the process of attachment is inconsistent with the constitution of the United States. Whoever will take the pains to examine properly, will find his design was to point out where the common law was applicable to the constitution of the United States. When speaking of the eulogium of Justice Blackstone upon the trial by jury, he says, it is owing to the trial by jury that Great Britain has rode out so many storms; if it had not been for that privilege, that government never would have been able to exist till this day. This amiable character has never hinted any doubts as to the power of attachment, he has never given us one single word as to its not being applicable to this country; on the contrary he must have considered it as the guardian of the independent and impartial administration of justice.

In 3d *Blackstone*, 379, there are a course of observations on the trial by jury, written in the most nervous manner, that is to be found in any author here or elsewhere on this subject. I will merely give the introductory and concluding essays; the Senate may at leisure look at the remainder. The whole is well worth their perusal.

"Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! But this we must refer to the ensuing book of these commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer*, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage were strangers to the trial by jury."

"Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of enquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums, and panegyrick on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution."

Now, sir, Justice Blackstone after this eulogium on the trial by jury, considered the process of attachment, to punish contempts by summary process, as one of the best means of preserving the purity of jury trial. If, then, Mr. Blackstone could write such an essay on trial by jury, he could not be cold to the rights of man. Any thing says the elegant writer, "which demonstrates a gross want of that regard and respect, which, once Courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people," is a contempt and punishable in a summary way.

* Montesquieu.

You have already heard read the passage in the 4th vol. of Blackstone, page 285, where the power of punishing contempts both direct and consequential are said to have been exercised as early as the annals of English law extend.

The provisions and remedies of law are generally adapted to prevent or punish the evils which more frequently happen. Where one offence happens in the view of the Court, two will take place out of Court, as may naturally be supposed. In the presence of the Court attempts of interruption will seldom be made, if the remedy is confined to offences of this description —whilst out of Court the evils and the insults would be frequent—the means prescribed not being commensurate to the object of keeping the streams of justice pure. The component and constituent parts of the law require on this head a general and fixed principle—it has therefore been adopted from the remotest periods of the law itself. It is not like the case of general warrants, which has been referred to—not for the advancement of arbitrary power—but for the preservation of the trial by jury and the liberty of the citizen.

Sir, the instance of the admiralty Court was mentioned by my colleague, and the answer was, that it was reserved in the constitution, which recognized the admiralty jurisdiction. That it was reserved in the constitution we well-know, but we also know that the Court of admiralty established a different practice from other Courts, and for a specific purpose—but the first article of the constitution expressly made trial by jury the leading principle; and that according to the common law.

It is impossible that the Court of admiralty can go on, unless it has the liberty to enforce its decrees by the process of attachment. I ask the learned counsel whether there is any other mode by which those Courts who proceed without a jury can carry their decrees into effect but by the process of attachment. For instance in the register's Court: A man on his death-bed confides to my care his last will and testament—I conceal it for sinister purposes.—The family of the deceased apply to the register—the register sends for witnesses and cites me to appear before him and produce the will—I refuse to go. What process but that of attachment will grant relief to the injured party? I ask, if that was not the case, whether I might not go to England or elsewhere with the money of the estate, long before a civil action could reach me? If executors, guardians or trustees, intrusted with minor's estates, refuse to settle accounts or to give security, where they are wasting the estate, what other remedy than attachment remains against the delinquents?

Before any expression of the legislature takes place on this subject, it ought to be done with deliberation; you ought to give it your most serious reflection before you make alterations, which may operate in ten thousand ways, and perhaps in many of them it might operate injuriously. Much caution ought to be used, because although the legislature might think they were preserving the liberty of the citizen they might endanger his most sacred rights.

I have stated most of the reasons for the exercise of this authority; and I flatter myself that the Senate will admit that there is great reason for continuing this power, as a security for the inestimable trial by jury. I acknowledge it is a great authority; but there must be such an authority vested some where, to strike terror into evil doers. I confess it is liable to abuse, and may, with the best intentions, be improperly exercised, but I do not see how the Courts can do without the power. Whenever it happens, through inadvertency, to be unduly exerted we have to regret the circumstance, but this is no argument against the necessary exercise of the power. We must take its little imperfections as some of the alloy which we have heard from the opposite counsel is mixed with liberty. All power is inconvenient to some people; whether it consists of a Tarpeian rock, or of the mildest laws, it is alike inconvenient to the immoral, the turbulent and vicious.

We have been called upon by the opposite counsel to draw a line beyond which this power is not to extend. There could have been no line—the power must have been indefinite—for if it was circumscribed they might as well be divested of it altogether—one of the two must certainly have been the case—either the Court cannot punish a contempt committed in their view, or they must have the power in every case appurtenant to their administration of justice. All contempts must be equally within their reach.

I would proceed to shew how this power has been reserved to the Courts by the constitution of 1776, and consequently by the constitution of 1790; but having as I suppose fatigued the patience of the Senate, and as I feel exhausted by my exertions in giving what is by some deemed to be the musty black letter definitions of the law, I will refer to another kind of authority which will afford a moment's amusement and relief to the mind, and will shew that the reasoning between a monarch and a chief justice is capable of affording us instruction. I refer to what must be fresh in the recollection of every historian. It is to be found in Shakespeare's works, in the scene between the late Prince of Wales, about to ascend the throne, as Henry the V. and the chief justice who

had committed him during his father's reign for rudely striking him, while sitting in Court. The reasoning of the chief justice applies with full force to the present question. [*Shakespeare's Henry* IV. *Second part. Act* V. *Scene* VI. *See Appendix, note* G. 3.] This speech of the chief justice is replete with good sense, and a proper spirit of independence; nor is Henry's answer less becoming his acquired dignity. Every good subject must wish that whoever holds the British sceptre may entertain similar sentiments. I contend, sir, that this is as precisely a precedent of the Court of King's Bench, as can be given; and this as early as the reign of Henry the IV. Such was the practice at that time, and such the respect paid to the due administration of justice even in those days, that the immediate heir to the throne of England, for a gross and outrageous contempt of justice, was not suffered to escape punishment, but was rebuked and instantly sent to prison. If such is the zeal with which they preserve the purity of the administration of justice in Great Britain, I hope it will be thought worthy of imitation in this country, where liberty is the foundation stone; where the protection and independence of the judiciary is made absolutely necessary from the very nature of our government; and where the trial by jury must be sacredly preserved.

Adjourned.

THURSDAY, January 24, 1805.

Mr. INGERSOLL—in continuation.

Mr. Speaker and Gentlemen of the Senate,

When I quoted and read last night from a book of plays, I did not mean to treat this case in a ludicrous manner or with the most distant degree of levity. It will be found that the same case is reported and has been copied into the books of the law. But I trust I have shewn that preventing any publications that may obstruct a fair hearing by the Court and jury, is absolutely necessary for the purity of jury trial. Any thing calculated to prejudice the Court or jury before the cause is heard must be highly injurious. In order to strengthen this part of my argument, I refer to Judge Wilson's works, third volume; not so much with respect to the beauty of expression, as to the strength of his remarks upon this subject. [*3d Wilson*, 35.] "Prejudices may naturally arise, or may be artfully fomented, against the crime; or against the man who is charged with having committed it. A delay should be allowed that those prejudices may subside, and that neither the judges nor jurors may, at the trial, act under the fascin-

ating impressions of sentiments conceived before the evidence is heard, instead of the calm influence of those which should be its impartial and deliberate result."

I now proceed to consider the authorities that this power, which I contend is necessary, has existed in the Courts of common law, and been approved of time immemorial, whereof the memory of man runneth not to the contrary; and that there is no knowledge of proceeding to the contrary, in all Courts proceeding according to common law. With regard to chancery cases I shall say no more about them, than to reply to the answers made to those already cited: I shall confine myself to common law cases, applying them to contempts committed out of the view of the Court. [2 *Atkins*, 469. *See Appendix, note* G. *page* 7.] It has been answered that it is predicated on a cause then depending in Court. The circumstances of this case are particularly strong in favor of the doctrine we contend for; and I trust that the Court will retain the distinction noticed in it. The Lord Chancellor takes the distinction. [reads] He says not only in an action, but as to any thing *before* me, on which I am to exercise my opinion, there shall be no publication. It cannot make much difference if there has even been a definitive sentence and decree, because on proper ground being shewn, a second trial might be ordered. It will be found too, that the objection was considered whether its not reflecting on the judge's person or judicial character, did not render the publication harmless. There is some difference between reflecting on his personal and professional character. In the last case there is not so much danger of his passions mingling with his prejudice in forming his judgment, it has not so much bias on his mind, as when the contempt is against his personal or private character. Here it is stated that there are three different kinds of contempt. The first is scandalizing the Court itself—the second is in abusing the parties who may be concerned in causes—the third, in prejudicing mankind against persons before the cause is heard. And we have authority for adding a fourth, that of publishing relative to a cause after a decision has been had on it; because a new trial might be granted and a different decision be made. The second kind of contempt, here enumerated, applies particularly to the case of Thomas Passmore.

Sir, notwithstanding that we have authority for saying that even if the suit should have been dismissed, a contempt may be committed; yet we are willing to consider the subject as it is restricted by the opposite counsel, "that there should be a cause depending at the time of publication." I will join issue with him and will refer to the record of the Supreme

Court. I think we shall find that the case comes within the gentleman's own definition; and that the judgment of the 6th of August was not voidable only, but void absolutely for the obvious reason that there was no authority to enter it. The second judgment was wrong entered to the 18th—it was equally a nullity, because the warrant gave authority to enter judgment only on the first agreement—on the report of two referrees.

I am not going to advert to Mr. Bayard's acquiescence or disagreement to the appointment of an umpire. If he did consent, the only consequence would be that the award of the arbitrators would be the ground of an action. In regard to the report it would not have made the difference of a hair. The informality of the entry would have been sufficient, in any event, to destroy its effect. But even the implied consent of Mr. Bayard never came before the Court.

The agreement did not authorise judgment on the report of an umpire. This Passmore was apprized of, on application to Mr. Burd, who is as well acquainted with the rules of practice as any man in Pennsylvania, without exception. When Passmore first applied to have it entered, Mr. Burd says, "we can't enter this agreement, because that judgment is to be confessed by an attorney, and therefore without the attorney's name it cannot have legal effect." The agreement without the power of attorney did not authorise him to confess judgment, nor did that which gave power to an attorney authorise the referrees to do it. Allow me to shew the honorable Court that I am correct in my statement, that the agreement did not authorise judgment on the report of the umpire. "We the underwriters, &c. [*See page 51 of this book.*]

I certainly may hazard the assertion without much danger of being contradicted, that when an authority is given to two it can be exercised by them only. It must be executed jointly and in no other way. On this a decision was fully had in a cause in the circuit Court of the United States wherein I was concerned. A commission was issued to a foreign country to take the depositions of witnesses. The commissioners were named, one or more on each side, and they were authorised to take the depositions. The commissioners on the part of the defendant executed the commission; but in this the commissioners on the part of the plaintiff had not joined. We contended that the proceeding was irregular and void—that the authority must be strictly pursued. The Court determined clearly and explicitly that the proceedings were infor-

mal, that an authority given to two must be exercised by both, and upon that ground they rejected the evidence.

The judgments of the 6th of August, and 18th of August were not only voidable, but void to all intents and purposes, and the evidence is resistless that the action was depending on the 8th of September, 1802, as much as it was on the first moment of its institution. Secondly, sir, I beg leave to read a part of the record in order to shew that on the 6th of September, it was considered by Thomas Passmore and his counsel to be in full life. This was only forty-eight hours before the publication, and during that time nothing had taken place that could possibly put a stop to it. "At a Supreme Court held at Philadelphia on the 6th day of September, 1802," &c. [*See page 55 of this book.*] Here, sir, it appears, by the record itself, that the execution was set aside; and that on motion of Mr. Levy a rule was obtained to take depositions in said cause on twenty-four hours notice, and the hearing of said argument postponed until the following term. What argument, sir? The argument on the exceptions to the report of the referrees. That would have been in December following.

I consider the above acts to be sufficiently explanatory of Passmore's knowledge on this occasion. They contain the declaration of all parties that the suit was still depending. I do contend with the most perfect confidence that those grounds are sufficient to establish the perfect knowledge of Thomas Passmore as to the suit being still undecided. It must be beyond dispute that the judgments were a mere nullity. Even if they had been regularly filed and perfectly unexceptionable, the very filing of exceptions to the award would have suspended the effect of the judgment, and until the Court had decided on the exceptions the action would have been in full force and operation.

In the case of Poole and Sacheveral, although the publication was after a verdict and decree, and the intention appeared to be innocent, yet as a new trial might be granted, the publication was adjudged a contempt. There had been as here, a judgment irregular, but a verdict unexceptionable in every particular. "In the spiritual Court it was adjudged a good marriage, &c." [*See Appendix page 25.*] I beg leave to observe that this was not done in view of the Court, it was not an immediate but a consequential contempt. One of the objections in this case was that no witnesses had come in. A similar kind of apology is made for Passmore, that the paper had not been seen by any person but Mr. Kitchen. But this is equally futile. He would have done all he could to injure the

feelings and interest of Mr. Bayard, but it is said he was interrupted by Mr. Kitchen's tearing down the paper. Mr. Passmore was certainly not the less criminal on that account. He evinced no desire to put a stop to the business.

Another objection in the case of Poole vs. Sacheveral was that "the matter was now over, (viz.) the sentence in the spiritual Court and the trial." I pray the Court to compare this with Passmore's case. In the case between Passmore and Pettit and Bayard the cause was not over. It was continued, and is yet pending for a trial by jury. Here with regard to the Court of Chancery the question was considered as done, and therefore at the time of publication there was no cause whatever depending. There was no day appointed for argument as in this instance. Though the judgment of the spiritual Court was confirmed by the Court of delegates, and a decision had at common law, yet the Chancellor very properly declares "it is not over," for on the reward offered, affidavits might come in, which would probably induce the Court to grant a new trial. I beg leave to ask if the opinion of the Lord Chancellor does not apply in the present instance; where although there was a judgment, yet if the Court should afterwards find the exceptions well founded, the award would be set aside and the cause remain to be tried by a jury.

I pray the attention of the Court to the meaning of the Lord Chancellor, as to a cause being depending so long as the judgment was liable to be overturned. So long as there is a chance of the cause being overturned it is considered as depending. Well, we have it sufficiently clear that Thomas Passmore's suit against Pettit and Bayard was carried on to December term, although he published his libel in September.

I shall trouble the Court with none of the chancery cases but what the learned counsel for the prosecution has adverted to. I shall confine myself to common law cases, though I don't know why chancery cases are not as applicable here as common law cases. On the hearing at the September term, the cause to be argued before the judges was upon the same principle as in chancery in every particular. It was to hear the credibility of witnesses, and the same mode of proceeding, is had in chancery as at common law. So early as in 1699, the chancery allowed it to be in the election of the defendant whether he would have interrogatories filed, or acquiesce in the affidavit.

In the rule for taking depositions we find it in the margin in this way, "*Thomas Passmore* vs. *Andrew Pettit and An-*

drew Bayard." This rule was taken on the 6th of September, by Mr. Levy, the counsel of Mr. Passmore. Was Mr. Passmore present or not present when his counsel took this rule for taking testimoney in the cause, and when the hearing of the argument in said cause was postponed until the December term. He was present, sir, and it is not creditable that in forty-eight hours the thing should have totally escaped his recollection.

The principle of punishing contempts will operate stronger here than in England, because we are more zealous to preserve the purity of trial by jury, and I may be allowed to say in the language of Mr. Curran, that the jury should come into the box "without any previous stain or prepossession, prejudice, passion, hope, fear or interest." Unless this was the case the trial by jury instead of being a blessing would inevitably prove to be a curse.

Under the head of the constitution, I shall have occasion to shew this honourable Court that punishing contempts by attachment was the uniform practice of the Court of Westminster-hall from time immemorial, that it had obtained in England and had been approved of for five centuries before that constitution was framed. This practice has been invariably applied to consequential contempts—to contempts committed out of Court. Indeed attachments for contempts are never used for such as are committed in view of the Court. The judges order the officer to take the offender immediately to prison, and a minute is made on the record by the clerk. There is no other process. This is for the purpose of preventing an obstruction of the Court. The fact being committed before the Court is ascertained, and it would be useless and unnecessary to go through the forms of an attachment.

The next case which I refer to is Shebbeare's. It has been hinted that we have nothing to do with it—that it does not apply. But I am of opinion that it embraces principles directly applicable to our subject. I will be permitted to read it. [*See Appendix page* 14.]

It is the peculiar province of the judges, and I hope it will always be such, to say what the law is, not what it ought to be. They have no right to legislate.

Here, sir, as to the material part, the affidavit is explicit that the defendant meant to execute the sentence in the usual way; and he positively swore that according to information he looked upon it to be the usual and ordinary way. But the

attempt to justify the contempt was in this instance considered as an aggravation, and the rule was also adhered to, that the defendant's swearing according to his belief does not excuse nor exonerate him from the penalty of the law.

This case was decided before some of the most eminent judges in England, and among the rest Judge Foster, who was as eminent for integrity as Lord Mansfield was for his wisdom and learning.

I believe that I yesterday adverted to Vernon and Scriven. I will not read the cases, but in pages 285, 299 and 386, and in other parts of the work, the Court will find a recital of a number, not of chancery, but of common law cases, to shew that the proceeding by attachment is a power without which the rules of the Court could not be enforced; and that the Courts of common law are as uniform as to the mode of proceeding as they are in chancery.

1*st Strange*, 185. This is a common law case, and was decided before that same Lord Cambden, of whom the learned counsel for the prosecution has spoken of, as the friend of justice, the friend of trial by jury, and champion of the rights of the people. The same who opposed the operation of the general warrants, and who in the whole course of his life, from his cradle to his grave, never gave an indication hostile to the liberty of the subject.

[Mr. Ingersol here read the case, "*Dominus Rex* vs. *Jones* —The defendant having treated the process of the Court contemptuously, an attachment went against him, *without a rule to shew cause*, (according to *Salk.* 84.) and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the Court sent for the sheriff of Middlesex into Court, and ordered him to take a sufficient force."]

They considered even the rule to shew cause as unnecessary. He had treated their process with contempt, and they issued their attachment immediately. This was not a contempt committed in view of the Court. If it had been, the principle is nearly the same. The contempt must not pass unpunished. The difference is so trifling that there is not an instance where the distance of the party from the Court is mentioned or referred to. Nor was this the case of an officer of the Court. It was the case of an individual, like that of Mr. Passmore.

In the same book, page 444, *Dominus Rex* vs. *Barber*—We find another authority. The manager speaks of a distinction

between common sense and artificial reasoning in the eye of the law; and he has said that these causes were all made by the king. The fact is, that when the motion is first made it is always made in the name of the individual and not in the name of the king. It is first made in the name of the injured party. The same principle operates in this country, and it is explained in Wallace's Reports, page 134. So it was in Oswald's case. The application is first made by the party supposed to be injured, and it is made in his name; but if it deserves further inquiry and an attachment issues, it assumes the name of the sovereign power. Thus in the circuit Court of the United States it first is in the name of the individual, and afterwards in the name of the United States;—and in the Supreme Court of Pennsylvania his name is dropped, and the name of the Commonwealth is substituted. An action of forcible entry by detainer is nothing more than to obtain redress for a private injury, although it is in the name of the Commonwealth.

It is not therefore as the honourable gentleman has told us, that these kind of actions are brought by the king. It is a mere technical definition, of ascertained meaning, where the application of the individual is on the *civil side* until the attachment issues, when the proceedings are on the criminal side and are entitled accordingly. The Court know nothing of the business until they receive the information from the complainant. There is nothing in the character of the Court which otherwise obliges them to take notice of it. To say that they are bound to do it, and that they must see all these things themselves, would be exacting qualifications equal to the prescience of the divinity himself.

3d *Burrows*, 1256. [*See Appendix, page* 20.] I beg the very particular attention of the honourable Court to this case. It would seem here that if an atonement had been made to the prosecutor it would have operated in mitigation—for we find the obstinacy of the defendant spoken of as an aggravation of the offence. But as to atonement we are told it is prostituting dignity and propriety. I am surprized it should be viewed in that light. In Passmore it would at least have been just and honourable to have made an atonement. And if that should have induced the Judges to dispense altogether with the punishment; then might the observation alluded to by the worthy manager apply, and "the recording angel" when he put it in at heaven's high chancery, "drop a tear and blot it out forever."

As to atonement it is a daily practice, it is sanctioned in all judicial proceedings, and it will be my duty hereafter to

shew the Court that it is founded on principles of law and justice. But atonement on the part of Passmore was obstinately refused. The Court were bound to protect Mr. Bayard as a suitor in, Court and not as an individual, and under that view they could not dispense with the punishment of the offender.

In this case of Wheeler, not only the report and judgment were at an end, but the money was actually paid. There was not even the semblance of an action. But there had been a rule of the Court of King's Bench, and that rule must be strictly pursued. Wheeler had, contrary to his own agreement brought a bill in chancery;—and this was deemed a contempt. After the business appeared to be compleatly at an end, after the defendant had withdrawn his suit and paid the most ample costs, the Court expressed considerable resentment. But as he had smarted severely and as the Court did not wish that a slight sentence should stand upon their records they waved giving judgment, *by consent*.

Here justice to the injured party appeared to be an important consideration. "I have," says he, "to request satisfaction, because my antagonist agreed to abide by the decision of this Court; but at the same time that he goes to the Court of King's Bench and promises consent to their final decision, he is harrassing me by his suit in chancery." The Court were bound to give him satisfaction, and it was equally their duty to take care that their proceeding should not be treated contemptuously.

Wheeler, in his answers to the interrogatories says, "I own the fact. I brought the bill in chancery, but I did not understand the rule. I did not know that I had consented not to bring such bill."

This, sir, is surely very much like the conduct of Thomas Passmore. "Though I published that paper against the character of Andrew Bayard, though I caused him to drink the cup of calumny to the very dregs, though I endeavoured to injure his reputation as a merchant, yet I did not know that any cause was depending." And this was at the very moment that he had obtained a rule for taking depositions to meet the argument at the next approaching term. But, sir, he not only took the rule for taking depositions, but he actually took the depositions.

Now I pray the honourable Court to contrast the conduct of the Court of King's Bench with that of the Judges of the Supreme Court. Compare the warmth of the former with the

mild and admonitory language of the latter. Says the chief justice, "this is a great and enormous libel; but, sir, if there had been an atonement made it might have ameliorated, or perhaps done away the necessity of passing judgment. You have had full time in forty-eight hours to make some reparation, but you have been obstinate. We are sorry that you have not prevented the disagreeable necessity of passing judgment." Mr. Ludlam, one of the witnesses for the prosecution spoke in the most unexceptionable manner of the mildness of the Court.

The enquiry of the Court is, "Has there been reparation for the private insult which is included in this public offence." Was not this question perfectly correct, sir? Shall there be a reparation as to a public offence, and shall there be none so far as respects the party as a suitor in the Court, when they are bound to protect him as such? But we are told that this is prostituting the dignity of the Commonwealth to private purposes. Sir, if the Judges of the Supreme Court with this case in their hands, or in their memory, had not acted as they did, they would have been unfit for their places. I shall undertake to prove that in the whole of this proceeding they acted upright and proper, with one single exception, resulting from mere humanity to Passmore, that of permitting him to go to his house without the custody of an officer. That I confess was not strictly proper, but I trust it will be forgiven.

This litigious person (Wheeler) who had to pay but twenty pounds originally, was not satisfied, although he had agreed to be governed by the award. He must set at nought the regular proceedings of justice, and for this contempt he is made to pay eighty-seven pounds four shillings, the costs which the persons mentioned in the rule had been put to, and perhaps his own might be as much more. Here was nothing to wound the ear of relations or friends, nothing to provoke a fight, nothing to destroy the man's private reputation, nor his character as a merchant; and yet the Court did not waive judgment, but *by consent*. They considered that the reparation to the private suitor even required his consent; and that without his concurrence the contempt ought not to pass without further punishment.

Now, Mr. Speaker and gentlemen of the Senate, I beg that this case may receive your most decided attention. It is a case of common law, and you will observe that it is not against an officer of the Court, not in the face of the Court, but against an individual for a contempt committed out of Court. There the bill brought in chancery was to destroy the effect of the

award against the defendant. Here, the libel by Passmore was to destroy the credibility of Mr. Bayard's exceptions, or to induce him in a storm of passion to commit some rash or intemperate act; for even the most meek and prudent may sometimes be irritated, and induced to resort to measures which may terminate in the death of one or the other on the Jersey shore.

The Court will find this case replete with information. They will find that the Court of King's Bench considered not the interest of the *man*, but as their *suitor* they would use the strong arm of justice to see that his antagonist should not have any undue advantage.

An additional observation may here be made,—that the act of May 22d, 1722, gives to the Supreme Court the powers of the Court of King's Bench, and refers to that Court as the model on which they are to proceed. This power has never been taken away. On the contrary it has been repeatedly recognized.

Vernon and Scriven's Reports, 299, 300. Allow me, sir, to make a few observations in order that you may the better understand the intention of producing this authority. The counsel on the part of the prosecution infers that as soon as Thomas Passmore appeared in Court, the Judges charged him with being guilty of a great libel. Now I shall prove that until Thomas Passmore had acknowledged through his counsel that he had put up the paper at the Coffee-house, no expression of one kind or other escaped from the Court. Then, and not till then, it was that the friendly hint was thrown out by the chief justice. He said it in the ordinary course of proceeding, and surely it was not improper then to say, "Mr. Passmore this is an enormous libel, and you certainly ought to make some atonement to the prosecutor—it may go in mitigation, if not entirely do away the necessity of punishment." Mr. Levy laboured with his client to induce him to take some step of this kind, but Mr. Levy laboured in vain. Was there ever from the Court any expression, that Thomas Passmore should debase himself as a man, a freeman, or a gentleman, by making any servile concessions? No such thing —but they wished him to acknowledge that he was wrong, and by that acknowledgment to do away as far as possible the injury of the libel. This Passmore obstinately declined; he did say that he was willing to withdraw his assertions against Mr. Pettit, but as to Mr. Bayard not a single word.

[Mr. Ingersoll here read the authority, Vernon and Scriven, 299, 300. *King* vs. *Mauclerk*, to shew that the defendant has

a right to ask for interrogatories, but that it could not be done on the part of the prosecutor. This was the case referred to by Mr. Dallas. (*See page* 199.) The defendant was fined and obliged to pay the prosecutor reasonable costs. In this authority reference is made to Bingley's case—and on this part Mr. Ingersoll observed, that he was much mistaken if Junius had not mentioned the case of Bingley, and that that elegant and ingenious writer had never objected to the mode of proceeding by attachment, if it was done in the ordinary way. Mr. Ingersoll also remarked, with respect to the costs which were awarded in the case of Mauclerk, that in every instance reparation to the injured prosecutor is taken into consideration.]

This authority, said Mr. Ingersoll, enables me to say that where the party does not confess or fully deny the charge they consider him as submitting—where the affidavits are not fully answered they are presumed to be true. But in the case of Passmore the crime, the posting of the libel was admitted, and Mr. Dallas was perfectly correct in calling for the judgment of the Court, in consequence of such confession,—and the Court were perfectly correct in considering the fact as established. This, sir, was strictly right in law, and I aver it as a lawyer. It will be found by recurring to the testimony that Mr. Passmore acknowledged the charge, as stated, before the chief justice made the expression which has been complained of.

Let me now add a case in our own Supreme Court. It is the case of Brown and Mitchel, for the record of which I am indebted to the prosecutor.

"RESPUBLICA *vs.* ANDREW BROWN. } RESPUBLICA *vs.* JAMES MITCHELL. } *In the Supreme Court of Pennsylvania, of April term*, 1789."

"Upon affidavit of Jacob Winnemore, filed and read together with certain pieces printed and published in the Federal Gazette and Philadelphia Evening Post, under the signatures of James Mitchell, in said Gazette, No. 128, and No. 132; and upon motion of Mr. Lewis, stating that said pieces, printed and published as aforesaid, related to and respected the merits of a case at the time of making the said publication, and still depending in said Court, wherein a rule had been obtained of the said Court, on the petition and complaint of the said James Mitchell, against Joseph Wharton, esquire, to shew cause why an information should not be granted and filed against him in said Court, for certain misdemeanors in his office, as a justice of the peace for the city and county of

Philadelphia, in the said petition and complaint of the said James Mitchell, particularly stated and set forth.

"RULE—That Andrew Brown, the printer of said Gazette, shew cause on Saturday next, at ten o'clock in the forenoon, why an attachment shall not be awarded and issued against him, for a contempt of this Court, in printing and publishing the pieces aforesaid, in the said Gazette, No. 128, and No. 132. And on James Mitchell, appearing in open Court, and acknowledging himself to be the author and publisher of said pieces, under his signature in said Gazette, No. 128, and No. 132. And also of two other pieces published in the Pennsylvania Mercury and Universal Advertiser, No. 362, under the signature of James Mitchell. And on motion of Mr. Lewis,—Rule, That the said James Mitchell, shew cause on Saturday next, at ten o'clock in the forenoon, why an attachment shall not be awarded against him for his contempt aforesaid,

"At a Supreme Court held at Philadelphia, for the State of Pennsylvania, the eleventh day of April, in the year of our Lord, 1789.

"And the said Andrew Brown and James Mitchell appeared in Court, in their proper persons, and the witnesses as well in support of as against the said rule being heard; Mr. Lewis thereupon moved the Court for an attachment against the said James Mitchell, for writing and publishing the pieces referred to, and stated in the said rule to shew cause, in the Federal Gazette and Philadelphia Evening Post, under the signatures of James Mitchell, No. 128, and No. 132; unless they shall by their answer to interrogatories to be exhibited to them, or otherwise, purge themselves of the contempt charged against them. Whereupon it is demanded by the Court of the said Andrew, whether he will or will not enter into a recoginance to answer interrogatories, to be exhibited to him, or answer gratis immediately, and exculpate himself of the contempt aforesaid, or submit his case on the evidence which has been given to the Court; and it is thereupon answered by the said Andrew Brown, that he will immediately answer interrogatories, to be proposed to him respecting the premises; the said Andrew Brown was thereupon sworn, and gave his answers upon oath accordingly in a summary way to the questions proposed to him. And it being also demanded of the said James Mitchell, by the Court, whether he will or will not enter into recoginance to answer interrogatories, to be exhibited to him respecting the premises, or answer gratis immediately, or submit his case to the Court upon the evidence which has been given to the Court; there-

upon declined answering interrogatories but submitted his case to the Court, on a consideration of the evidence given in Court.

"Whereupon the aforesaid Andrew Brown and James Mitchell were ordered to give their own recognizances, severally, for their appearance at the said Supreme Court, on Monday at ten o'clock in the forenoon, for their appearance, and to abide the judgment of the Court in the premises.

"Andrew Brown tent. Reipublica in £. 200, upon condition that he personally be and appear at a Supreme Court, to be held at Philadelphia, on Monday the 13th day of April instant, at 10 o'clock in the forenoon, to receive and abide by the judgment of the Court in the premises, and not depart without licence.

"James Mitchell tent. Reipublica in £. 200, upon condition that he be and appear personally at a Supreme Court, to be held at Philadelphia, on Monday the 13th day of April instant, at 10 o'clock in the forenoon, to receive and abide by the judgment of the Court in the premises, and not depart without licence.

"13th April, 1789. Andrew Brown and James Mitchell appeared in Court in their proper persons, whereupon it is considered by the Court, that Andrew Brown pay a fine of five shillings to the State, and discharge the costs of prosecution. And that James Mitchell pay a fine of £. 3 to the State, and discharge the costs of prosecution. Int. Comm."

Now, sir, here is a formal record of a decision, an antecedent case in our own Supreme Court, and the learned counsel will perceive that in almost every point it bears immediately upon the case of Passmore.

I shall now refer to *5th Brown's Parliamentary Cases, pages* 90, 91. We can only give the opinion of the counsel. We cannot give the reasons of their lordships; they do not condescend to give the reasons for their judgment; but merely affirm the argument of those they decide for as they have on the present argument.

This was on attachment for taking and withholding a brief of a party to a suit.

"On the other side it was contended, that from the examination of the appellants, and of *Studert* and *Stoughton*, as well as from the nature of the transaction, it plainly appeared, that the brief was taken and detained with an unjust, fraudulent

and wicked intent, in order, by discovering the secrets of the respondents case, and the nature of their defence, to enable the appellants to procure witnesses to contradict it; and as the brief contained matters relative to a cause then depending in the Court of Exchequer, the offence became cognizable there, and was a very high contempt of that Court, and properly punishable by attachment. That though the taking of the brief might subject the offender to an action at law, or even to a criminal prosecution, yet the Court of Exchequer was entitled *not only* to have its justice and honour satisfied, by a due punishment of the persons guilty of so great a contempt, but had, as all Courts of justice have, full power to punish such contempt. And though it might be insisted, that the brief was not in itself evidence against the respondents; yet as a discovery of the secrets and merits of their case, might be productive of perjury and subornation of perjury, and thereby a cause of great oppression upon the suitors, as well as an obstruction to the justice of the Court wherein the cause was then depending; and as this discovery was obtained in so surreptitious a manner, the offence was highly deserving the censure and punishment of that Court. That as to the order of the 19th of February, 1750, not allowing the appellant *Bateman* to dismiss his bill in the Court of Exchequer, after the application to that Court for an attachment against him, it was insisted, that the said order was just, and agreeable to the daily practice of Courts of equity, who constantly refuse this liberty, when it is intended for the purposes of oppression, and to elude the justice of the Court, as was plainly the present case."

I will not read the passage in *4th Blackstone*, 285, as it was originally read by my colleague. The Court will observe by referring to Blackstone, that the doctrine is found in a brief and comprehensive shape. He has summed up the whole in a masterly manner, and the Court will find that he distinguishes precisely as we distinguish. With regard to those attachments for the non-payment of awards of money, he says, it is a civil process, but a contempt of the rule of the Court and of the administration of justice, and in fact all other contempts, except those for the non-payment of awards, are classed under the denomination of criminal proceedings. He tells us that laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. Indeed the power of the Courts to administer justice would be not only paralized, but I see they must stop. They would have no security against the most wanton attacks, and could obtain no reparation for insult and injury, unless it was by an application to the legislature. The legislature might grant them authority for specific cases,

but where is the man whose mind is so extensive as to provide a remedy for those infinite number of cases which might present themselves.

I beg leave again to refer to the case mentioned last night —that of the widow and orphans in the city of Philadelphia, and I trust the Court will keep in mind, that the exercise of this summary authority was the sole means of saving that widow and those orphans from being reduced from a state of affluence to penury and want.

The exercise of this power is a necessary concomitant, a necessary supplement to that inestimable privilege of trial by jury, which has been the pride and the security of the country from whence we have derived it. But it will be said, "are the rules of chancery in England to be followed in Pennsylvania,—are we subjected to look for laws to a country whose arms we have conquered? By no means. The idea is degrading to the dignity of an independent member of a federate republic." But in order to know what is the law on contempts in Pennsylvania at this time, it is necessary to ascertain what it was at the memorable period of 1776. We ought to look at the nature and the reason of those laws which we had selected as applicable to our situation; and we ought to consider the models of those laws in England have been closely followed from the earliest settlement of Pennsylvania. We ought to consider that in England the laws are less exceptionable than in France and other countries.

We ought to consider the people of England as of other countries, "in war enemies—in peace friends," and this sentiment has been emphatically expressed by the people of America.

That the Courts of Pennsylvania would naturally adopt the practice of the Courts of Great Britain is according to reason and propriety. The rules of law in no other country appear so well adapted to our situation. We were to trace what the law was when we became independent. The process of attachment and other practice of the law Courts in England had been exercised in pure times, and with the consent of the most ardent friends of liberty. It is not then in the least extraordinary that the people of this country should follow so wise a model; we were fond of imitating the laws and customs of our ancestors;—and the convention of Pennsylvania with a condescension that does them honour, recognized and adopted those forms of law which had been in use among the people, and which were not inconsistent with the principles of the revolution. They knew that the task of

making a code, at once, suitable to the situation of the people, was a task truly Herculean; they might not only fail, but in failing do immense injury to the people they meant essentially to serve.

I think I have clearly shewn that this summary process of punishing contempts, is an inherent part of that common law adopted by the people of Pennsylvania as their birth-right, and confirmed by the convention.

If then this practice be an inherent part of the common law, the power in the Courts to punish contempts by process of attachment must continue until done away by some law emanating from the people, either in a constitution or by an act of assembly.

In the second volume of Judge Wilson's Works, page 44, we shall find that the common law has been considered as deriving strength and animation from the spirit of liberty.

"How steadily and how effectually has the spirit of liberty animated the common law, in all the vicissitudes, revolutions and dangers to which the system has been exposed.

"In matters of a civil nature that system works itself pure by rules drawn from the fountain of justice; in matters of a political nature it works itself pure by rules drawn from the fountain of freedom."

Sir, it was not for about forty years after the first settlement of Pennsylvania, that an act of assembly was passed on the subject of the Courts. I appeal then to the common sense of every one present, whether the people had before this period any rule to guide them on legal questions. They had no rule of their own, and they of course fell into the habit of following the practice of the only Courts in the world with which they were acquainted. In 1722, the act of assembly passed, establishing certain Courts of judicature. And that act I conceive to be only declaratory. Not so much as originating any forms of law; but as declaring the practice of the Courts in England. In the framing of this act the finger of the legislature is pointed at the Court of King's Bench. They would have been regardless of the safety and happiness of the people, if they had not made a close copy of what was considered as directly applicable to their situation and circumstances. It certainly must have been their wishes to follow the models of that country to which their hearts were knit by the ties of kindred affection. Not only in 1722, but in 1760, the same sentiments of regard for the mother country pervaded the

minds of the people. And Great Britain might have retained the warm affection of their hearts for years after, had it not been for that system of cruelty, pursued by their ministers, which dismembered their mighty empire.

With regard to the powers granted to the Judges of the Supreme Court, the legislature speaks in a language intelligible to all. They meant to make their powers as ample as the circumstances of the people required. They therefore tell them the Courts of King's Bench, the Courts of Common Pleas, and the Courts of Exchequer are your models. You are to pursue their practice. They do more. Almost every incident, that was to be the subject matter of law, was confided to their controul.

"Section 13. And that the said Judges, or any two of them, shall have full power to hold the said Court, and therein to hear and determine all causes, matters and things, cognizable in the said Court, and also to hear and determine all and all manner of pleas, plaints and causes, which shall be removed or brought there from the respective general quarter sessions of the peace and Courts of common pleas, to be held for the respective counties of Philadelphia, Chester and Bucks, as also for the city of Philadelphia, or from any other Court of this Province, by virtue of any such writs: And to examine and correct all and all manner of errors of the justices and magistrates of this Province, in their judgments, process and proceedings in the said Courts, as well in all pleas of the crown, as in all pleas real, personal and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct: And also to examine, correct and punish the contempts, omissions and neglects, favours, corruptions and defaults, of all or any of the justices of the peace, sheriffs, coroners, clerks and other officers, within the said respective counties. And also shall award process for levying, as well of such fines, forfeitures and amerciaments, as shall be estreated into the said Supreme Court, as of the fines, forfeitures and amerciaments, which shall be lost, taxed and set there, and not paid to the uses they are or shall be appropriated. And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises"—What are the premises? Suits of all kinds whatever, and actions to any indefinite extent—there is no restriction with regard to the greatness of the amount—and we see also the particular intimation of their jurisdiction over the other magistrates. The legislature said, we mean to make it a Court of general jurisdiction, and therefore the premises include all suits that may come before the Supreme Court originally, all suits that may be removed or brought there from

the inferior Courts, and to examine and correct and punish all errors, contempts, or defaults of the justices and magistrates in the Province. These are the premises "hereby granted."

"And exercise the powers hereby granted concerning all and singular the premises *according to law.*" What law? The common law most undoubtedly. They knew no other law. I am speaking the language of the legislature at that time, when I say that they knew no other law. Sir, they must have meant that alone, for the laws of Pennsylvania would not have made a pocket volume. They had formed no code or form of laws whatever. They are to proceed "*according to law.*" How? As the Court of King's Bench, Common Pleas and Exchequer. It is impossible there can be a doubt of this.

The legislature, as if they had intended to preclude all possible question as to the fullness of the authority of the Supreme Court, said, we wish this Court to be vested with the general powers of the Courts in England,—we mean to unite all in this great Court, but as we cannot recite them all, we won't particularize. We know that the laws are justly administered in Great Britain. They shall therefore have all the powers of the King's Bench, the Common Pleas and Exchequer. And they shall exercise these powers "*according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them may or can do.*"

At this time the institution which had shocked humanity and deformed the pages of British history was no longer in existence. The Court of Star Chamber had been swept into destruction, if not into oblivion, in the time of Charles II. This was in the reign of George I. a very different æra from that of either the first or second Charles.

With the powers of the Court of King's Bench, &c. was included the power of punishing contempts as a necessary mean of preserving the trial by jury.

I believe if the honourable Court will exercise their judgment as to this concomitant power, they will find that it is absolutely necessary; and that it has always been considered as interwoven with the law of England itself—"growing with its growth and strengthening with its strength."

It is in the free declaration of the legislature of Pennsylvania, that this power is given. In this manner, after the act had passed, it must have been considered, generally speaking,

as a matter of course; that all the common law powers of the Courts of England were vested in the Supreme Court.

And suppose this honourable body were in the convention of 1776. You would say, "we know that the Courts of justice have closely copied the laws of England; but shall we say that we ought at once to take from them all power to do so, and prescribe specific laws and rules to meet every object." Would you tell the judges or the people "you have now no common law, you must proceed by positive statute." Remember that the convention of 1776 would not attempt it. They must be men of superior order, approaching to the attributes of the deity himself, to be able to form a code of law competent to meet every object and every occasion. But the convention were too wise to do it. It was not practicable. Had they made such an attempt, the moment it was done new cases would arise for which there would be no provision.

If a man is knocked down in the street, there is no act of assembly which gives him redress. And this would be contrary to that universal maxim of common law "for every wrong there is a remedy"—he who has a right has a remedy.

The French revolution furnishes examples in support of the common law. While the present emperor was first consul, he and the two other consuls were desirous of having a general code of written laws to answer every exigency. On this subject he appointed certain eminent characters to make report, and this report contains the decided expression of their sentiments, that with regard to crimes remedies might be generally provided to meet various cases—but that the principle could not be extended to civil matters. By means of my late friend General Noailles I hold in my hand the report. I will refer to the 9th page of the preliminary discourse: [For the original in the French language, see Appendix, page 70, note F. 3. Mr. Ingersol gave a verbal translation nearly if not exactly as follows:]

"On opening our inference, we were struck with the opinion so generally received, that in digesting a civil code, some text very concise on each subject, might suffice; and that the great art is to *simplify* and *foresee* all.

"To *simplify all*, is a subject on which there is a necessity to be understood.—To *foresee all*, is an end which it is impossible to attain.

"Laws must not be unnecessary;—they weaken those that are necessary, and bring into question the certitude, and dignity of

legislation. But a great state as France, which is at the same time agricultural, and commercial, which contains so many different professions, and which offers so many different kinds of industry, will not allow of laws as simple, as those of a society less wealthy, and more limited.

"The laws of the twelve tables are without ceasing proposed for a model; but can one compare the institutions of a young, or growing people, with those of a people already arrived at the highest degree of riches, and civilization? Rome born *for grandeur*, and destined, (to use the expression,) to be an everlasting city, was not long in perceiving the insufficiency of her *first laws*. Did not the changes which insensibly took place in her manners, extend also into her legislation? Did she not soon begin to distinguish between the *written*, and *unwritten law*? Did there not grow up successively the *decrees* of the senate, those of the people, the *edicts* of the prætors, the *ordinances* of the consuls, the *regulations* of ediles, or the *decisions* of the civilians, the *pragmatic sanctions*, the *rescripts*, the *edicts*, and the *civil laws* of the emperors?—The history of the legislation of Rome, is nearly that of the legislation of all nations.

"In despotic states, where the prince is the proprietary of all the territory, where all the commerce is made in the name of the chief of the state, and for his profit; where the individuals have neither freedom, will, nor property, there are more judges, and executioners, than laws.—But whenever the citizens have property to defend, and preserve, wherever they have political, and civil rights, and where honor is esteemed as reality, there must necessarily be a certain number of laws, to meet the various objects of controversy. The different species of wealth, diverse kinds of industry, and the various situations of human life, require different regulations.—The care of the legislative must be directed to the multiplicity, and importance of the objects to be provided for.—From hence comes that scrupulous forecast, observed in the codes of civilized nations, which multiplies the particular cases, and appears to make an art of reason itself.

"We have not then believed it proper to simplify the business of legislation, to leave the citizens without regulations, and without a guarantee on their greatest interests.

"We have equally avoided the dangerous ambition of being willing to regulate, and foresee all. Who would believe there are those, to whom a code always appears too voluminous, and who would dare to prescribe imperiously to a legislator, the terrible task, of abandoning nothing to the decision of a judge?

"Whatever may be done, the positive laws never entirely supercede the use of reason in the natural affairs of life. The wants of society are so multiplied, and their relations so extensive, that it is impossible for the legislator to provide for all. Even in the affairs which occupy particularly his attention, numerous details will escape him, or which are too contradictory, or too changeable, to become the object of a text of law.

"A code, however complete it may appear, is no sooner finished, than a thousand unexpected questions offer themselves to the magistrate;—for the laws once digested, remain as they were written:—but men on the contrary never repose, they are always fluctuating, and this movement which never stops, and the effects of which are by circumstances diversely modified, produces every instant some new combination, some new fact, some new result. —Numerous matters are therefore necessarily abandoned to the *empire of usage*, to the *discussion of professional characters*, and to the *decision of the judges*."

"In a great country like France, with all the wishes of the rulers, it was a thing impossible to be obtained. And in this country it would be equally impracticable; our commercial interest is rapidly encreasing, and, at this time, our tonnage is second I believe, to any country on the globe. It is only inferior to that of Great Britain.

Every nation in the world has its common law—there are no people on earth without it. Rome was soon obliged to distinguish between the written and the *unwritten law*—and, what is that but the common law. She acknowledged the deficiency of her first laws. Judge Wilson thus expresses himself, in his usual strong and elegant language, on the subject of the common law. "Time is the wisest of all things. If the qualities of the parent may in any instance be expected in the offspring, the common law, one of the noblest births of time, may be pronounced the wisest of laws." [See page 185, where the quotation is given more at large by Mr. Dallas.] I contend that the common law instead of being the law of slaves, is the law founded by the consent of the people generally. The term common law is not confined to the territory of England. Euripedes mentions the common law of Greece, and Plato defines that which is taken up by the common consent of all classes of the people, to be the common law; and in that same report, [alluding to the French] the gentleman will find that there were numerous cases wherein it was deemed totally impracticable to make provision by positive law. They were therefore obliged to abandon the attempt, and take for their common law that which was originally introduced from the Roman civil law.

of the same. That each and every one of the laws or acts of general assembly that were in force and binding on the inhabitants of the said province on the fourteenth day of May last, shall be in force and binding on the inhabitants of this state from and after the tenth day of February next, as fully and effectually to all intents and purposes as if the said laws and each of them had been made and enacted by this general assembly; and all and every person and persons, whosoever, are hereby enjoined and required to yield obedience to the said laws as the case may require, until the said laws or acts of general assembly respectively shall be repealed or altered, or until they expire by their own limitation."

This was a rational and manly mode of procedure. The legislature knew that those laws were indispensible to the immediate circumstances of the people, and therefore they wisely said, let them be in operation, until they are supplied or expire. The legislature can, if they think proper, alter them. They meet every year and will always have a full opportunity of altering or repealing such laws as may appear inconvenient.

Of this section three lines remain to be read, that are of the utmost importance to our present enquiry:—"and the *common law* and such of the statute laws of England as have heretofore been in force in the said province, except as is hereafter excepted."

And this recognition of the common law brings me to the other great point of my argument:—Is this proceeding by attachment inconsistent with the constitution? If it is I will join heart and hand in reprobating it;—but we shall prove it to be consistent and proper: As to the common law there is not a single exception contained in this act. If there is, either here, or in any other act, the burthen of the proof falls upon our antagonists, and not on us. But as if it was to remove any doubt that might arise on the subject, the legislature declared "Sect. 3. And be it further enacted by the authority aforesaid, That Courts of general quarter sessions and gaol delivery, and Courts of petty sessions, Courts of common pleas, orphans Courts, and Supreme Courts, Courts of over and terminer and general goal delivery, shall be held and kept in each respective county in this state, at the times and places directed and appointed by the said laws or acts of general assembly and circuit and nisi prius Courts, as directed in and by an act of general assembly of the said province, passed the twentieth day of May, one thousand seven hundred and sixty-seven, entitled "An act to amend the act for establishing Courts of judicature within this province," by the justices and judges

that shall be hereafter elected and appointed; the same to commence in each county on the same days of the same months respectively appointed by the said laws for holding such Courts that shall be next after the judges or justices of such Courts are qualified to hold the same, and shall have, use and exercise all the powers, authority and jurisdiction that by the aforesaid laws, justices and judges of such Courts respectively heretofore have had, used and exercised, and the powers of chancery given to the justices by the constitution of this state, agreeable nevertheless with this act and such other act or acts of general assembly as shall be hereafter made; and every officer of all and every of the Courts in this state, that is or shall be appointed, shall have, use and exercise the same or like powers that such officer or officers of the same title, character and distinction might, could or ought to have had, used and exercised under the charter and laws of Pennsylvania, until displaced."

They vary the expression so that it may be clearly understood,—and that the law may be exercised as before, subject to a future, gradual, liberal and prudent alteration.

In the name of common sense and all that is dear to freemen, how could they act otherwise. Recollect, sir, the state of things at that time. The enemy were in possession of New-York. They were extending their forces to the banks of the Delaware. The battle of Trenton was on the 24th of December, 1776, a month and four days only before the passage of this law. Now was it not natural for them to say we will put the Courts of law in the same state that they were before the declaration of independence, and when the storm of war is over,—when the calm of peace is restored, if we find any thing inapplicable to our circumstances, or inconsistent with the pure principles of liberty, we will alter it, or we'll prune and modify, or altogether abolish it. But for the present we will reinstate the judges, and we call upon them, and all other officers of the Courts to go and exercise their powers as formerly.

It would be a trap for the Judges,—it would be imputing to the legislature a pitiful trick, to say that "the law is no longer of any effect, and yet the circumscribed sphere of obedience is yours." But the legislature did not act is this way. It was a mark of their wisdom with respect to the law, to place every thing as it was; if any thing should prove to be wrong, they could interfere at the proper time; and I take it upon me to say that the faith of the legislature was as much pledged in support of this principle, as if it had been written in capitals from one end of the act to the other. Adjourned.

SAME DAY, *P. M.*

Mr. INGERSOLL—in continuation.

Mr. Speaker,

I have referred to one or two cases on the record. It is proper that I should put them in possession of the Senate. By the one of the 6th of September, 1802, a copy of which we have in the hand-writing of Mr. Burd himself, it appears that on motion of Mr. M'Kean, and by consent of Mr. Levy, the counsel of Mr. Passmore, the execution was set aside, and on motion of Mr. Levy a rule was obtained for taking depositions in the cause, on twenty-four hours notice, and the hearing of the arguments postponed until the ensuing term. The libel was published only two days after, on the 8th of September. On the 27th [26th] of October, 1802, Mr. Passmore, by his written declaration, says, that this action is for the use of John Travers of the city of Philadelphia, merchant—that is, the *action* which was depending on the 6th of September, 1802. On the 16th of November following, the deposition of Mr. Miller, drawn by Mr. Levy, is filed. Could Thomas Passmore then, with the full knowledge of these facts, undertake to say that he thought the action was not depending on the 8th of September, 1802, when he published the libel?

I will now proceed to consider the great question, does this process of attachment and the exercise of it in the case of Passmore contravene any of the provisions of the constitution, either of '76 or '90? I am willing to meet the question in its strongest point of view, and I feel confident, I can satisfy the Court, that "*the law of the land*" is distinct from "*the judgment of our peers.*" That *the law of the land*, as it was in the year 1776, was intended by the convention to be left in full force and operation: And although the expressions of the present constitution as compared with that of '76, afford the strongest conclusions in our favor, I am content to meet the question even under that constitution. In the last constitution there is a change of words, and I say the expressions are stronger in the present constitution than in the last. In the first constitution the expression is general, in the latter we find the trial by jury restricted to cases of indictment and information.

The words of the first constitution are precisely these: "In all prosecutions for criminal offences, a man hath a right to be heard by himself and counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land or the judgment of his peers."

It is said, and that is the strength of the argument, that in this section there are no exceptions; that a contempt of Court is a criminal offence, and as in all criminal offences the accused is to have the benefits granted by this section, therefore the conduct of the judges was in violation of the great fundamental law of our country.

I shall endeavor to shew that this clause related to treason, felony and misdemeanor, which had always been proceeded against in the ordinary mode by indictment or information; but I believe I shall have no difference with the opposite counsel when I say that there never was an indictment for a contempt of Court. I wish to make my course of reasoning as short as is consistent with the subject. It seems to require very little reasoning to shew that this clause is merely a reference to treason, felony and misdemeanor. I cannot see any other natural inference that can be drawn. No one can believe that it was intended to deprive the Courts of a power they had immemorially used, and without which it would have been impossible to preserve the purity of justice. Without this power, sir, offences of a highly dangerous tendency, as they regard the pure administration of trial by jury would remain unpunished, as many of them would be not indictable by law and no trial could be had. In short, without some such power the trial by jury would yield but a trifling security to the citizen.

The law of the land means something different from the judgment of the peers, or that constitution would be inconsistent with itself. The 22d section of the same frame of government (constitution of '76) provides for the trial of impeachments before the president and council, who shall hear and determine the same. But, sir, it does not give the accused the right of trial by jury, although the 9th section of the declaration of rights attached to the same frame of government says that he shall not be deprived of it. These provisions it would seem are in direct repugnance to each other. It would be inconsistent to say in one place, that in *all* cases there should be trial by jury, and in another, that there should not be any such trial. If our opponents are right here is a contradiction which they have not reconciled.

If the expression *judgment of his peers* is to be universal, where the proceeding is for a criminal offence, there would be no occasion to say that the trial of impeachments should be by the president and council. It would be a direct inconsistency. This 9th section is better understood when we compare it with the 22d section of the frame of government. But if "judgment by peers" and "the law of the land" mean the same thing, I wish to know why the convention should use this idle redundency of words? What other purpose could it have answered but the purpose of raising obscurity and doubt in the very charter of our

rights? It is a rule of construction applicable to all instruments, but more particularly to instruments of this kind, that you are to give effect to every word. You are not to suppose that any word is intruded without a meaning. If "*judgment of his peers*" and "*the law of the land*" mean the same thing, why did not they free us from difficulty, and make it read "but by the judgment of his peers." The addition is a surplussage of no use whatever, except, as I said before, to create doubt and obscurity. You will observe that the words "*law of the land*" are prefixed to "*judgment of his peers.*" It is reasonable to suppose they were to have some specific meaning, but if not, why are they prefixed, because by merely leaving out the words "law of the land" the sentence will be full and expressive. I can easily comprehend that in cases of doubt the convention would have used words for the purpose of explaining, but here there was certainly no occasion, when by the argument of our antagonists they express precisely the same thing.

I presume the whole of the 9th section must be taken together, in which case we shall reconcile the expression "*law of the land*" with "*judgment of his peers.*" Suppose the only expression was "*nor shall any man be deprived of his liberty except by the judgment of his peers,*" would not every man say there is a trial by jury in *all* cases. If the only words were "*nor shall any man be deprived of his liberty except by the laws of the land*" would it not be perfectly obvious that a man might be imprisoned without a trial by jury, in whatever manner the laws of the land direct. By what ground of argument, then, can they be considered as synonymous—and by what hocus pocus, strange kind of legerdemain can they obtain a different meaning when put together from that which they convey when separate. Again, sir, it is said that they shall not be deprived of liberty except by the *law of the land* or *a trial by jury*. By the word "*or*" it appears there must be a diversity in the method. After making use of that word, it would be ridiculous to say that we meant in one way, and not in two. We must expunge the copulative "*or,*" or we cannot get the construction contended for.

When both are made use of and distinguished by the word "or" they amount to a declaration that there shall be a trial by jury, except in those cases, where, by the laws of the land, Courts are authorised to proceed in a different manner; and this must be understood with a qualification confined to the laws at that time. Not that the legislature might in future pass laws to deprive the citizen of a trial by jury, in any case where it had been formerly allowed or enjoyed. They were not at liberty to encrease the number of instances by which a man could be deprived of his liberty without the trial by jury. This was a part of the fundamental law by which the legislature are always to be governed.

I conceive that the proposition for which we have the honor to contend is already sufficiently understood; but if this Court will allow me half an hour's time, I will place it beyond all probability, and shew that it is as capable of moral, as any problem in Euclid is of mathematical demonstration. I have stated the line of distinction intended by the convention. I shall prove that it has been the practice to punish contempts by attachment,—and that in cases of outlawry, executions actually took place antecedent to the constitution of 1776,—without a trial by jury.

Sir, the language of the convention must be clearly understood. So far say they as the Courts have been in the habit of proceeding without a trial by jury we confirm the practice, but the legislature are prohibited from granting any new powers by which the trial by jury shall be taken away.

There is another rule of construction which may be very properly applied. Whenever in writing I borrow a word from any art or science, I am supposed to use it in its known and received sense. We are then to enquire from whence this expression came? Where did the convention find it? Did they not borrow it from some source where it had been long used, understood and explained? The expression, sir, is the same as in the twenty-ninth chapter of *Magna Charta*. The words are "no freeman shall be taken or imprisoned, &c. but by the lawful judgment of his peers or the law of the land." They were taken from that, and engrafted as a foreign scion on our native stock, with this improvement that in England (as has been said, on the part of the prosecution) there is no written constitution; whereas with us, American wisdom first devised, and American wisdom first adopted this glorious safeguard of liberty. There is no other difference between the expression in the twenty-ninth section of *Magna Charta* and the ninth section of the bill of rights of 1776, except the transposition of the words "*judgment of his peers*," and "*law of the land.*" With regard to the words there is no difference.

I ask what was the meaning of those words, not for a day, not for a year, but for the lapse of five hundred and sixty-odd years before they were introduced into our constitution? I speak from recollection that there were no less than thirty acts of parliament confirming *Magna Charta*, and in all those acts not a single instance can be shewn that the principle was ever considered in any other light than that which we contend for. Nor was there ever a suggestion that the process of attachment was one of the causes complained of.

A case was cited from 1*st Blackstone's Reports, page* 555, in order to shew that a usage may exist for a long time, but

if found inconsistent with essential principle, it must give way, and in that respect, I conceive the rules of the common law to be founded on sound sense. Undoubtedly there may be usages existing for a long time, and if found to be inconsistent with justice and equity they must give way. But in the present case, with respect to the process of attachment, it has always been considered as a salutary provision. During the lapse of centuries, no judge, no lawyer, no patriot, ever lisped a sentiment of doubt upon the legality and propriety of the practice,—and to the extent for which we contend, it has been in constant use. *Usitata and approbata.*

[Here Mr. Ingersoll referred to 1st vol. Sir W. Blackstone's Reports, page 560, being a part of the case referred to by Mr. Rodney, relative to general warrants. Mr. Ingersoll appealed to the opinion of Judge Mansfield, to shew that the general warrants were in direct contradiction to the principles of common law; that even during the time of Lord Hale,—during the protectorship,—they were considered as illegal and void; and he quoted from the learned judge the following sentiment: "Usage will not change the law, yet it is conclusive evidence in favour of the magistrate who grants the warrant; if accused of malice or partiality merely from the illegality of the warrant"—that even if the warrant is granted in direct contravention of the law, yet if it is a usage so to grant it, the magistrate is not answerable for the contrariety.]

During the lapse of five or six hundred years, no complaint has been made against this mode of proceeding by attachment. Russel, Sidney, Pym, Hampden are names illustrious in the records of freedom. The exertions of those patriots were directed to the reform of abuses and to the protection of liberty in Great Britain; and yet, from none of these, at any period of time whatever, was there a suggestion that this power was either oppressive or improper.

Mr. Fox's bill, sir, was mentioned and it deserves consideration. It is well known that Mr. Erskine, who was a good man, a patriot and a great lawyer, opposed the idea that the jury should not be judges of the guilt or innocence of the accused, in cases of libels; and his conduct in the case of the Dean of St. Asaph does him much honour. Mr. Erskine indeed argued with a strength of reasoning that will eternize him; but, sir, do the gentlemen mean to apply that case to the present? Did Mr. Erskine undertake to go before the House of Lords and impeach the Judges? No, sir. He adopts the only proper mode of procedure. He consults with his friend Mr. Fox, and procures the passage of a bill, by which the jury are vested with the right to determine, not only on

the fact of publication, but whether the publication was a libel and the defendant guilty. In short, sir, I believe they did it upon the principles adopted here, and it is not the only instance, and I tell it with pride, in which they have copied things from our constitution and our laws. If this summary process was considered as oppressive or improper, would Mr. Fox and Mr. Erskine, and other patriots, have overlooked it in correcting the law of libels.

Blackstone says, that the words, "law of the land" mean precisely what we contend for. Both Blackstone and Gilbert declare, that the process of attachment is a part of *the law of the land*, and as such *confirmed by Magna Charta*; and this was an established construction known to some or to all those who framed the constitutions of 1776 and of 1790. They knew it had been the construction, for centuries, of the same words, though used in a different instrument.

Having made these previous observations I now beg leave to read the twenty-fourth section of the constitution of 1776, which expressly affirms this power as usually exercised.

"Sect 24. The Supreme Court and the several Courts of common pleas of this commonwealth shall, besides the powers *usually* exercised by such Courts, have the powers of a Court of chancery, so far as relates to the perpetuating testimony, obtaining evidence from places not within this state, and the care of the persons and estates of those who are *non compotes mentis*, and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution."

Well, then, I ask if this is a power which has been *usually* exercised, is it not by this provision compleatly vested in the Supreme Court? But, our opponents say, "why don't you produce instances where it has been exercised? Why don't you produce a thousand, a hundred, or even a dozen cases?" We answer that the enemy have taken away our records. From the year 1741 to 1767, a great part of the period in which we subsisted as a province, all those records are missing except from the years 1741 to 1746. They were all carried away by the British. I mean the records of the Supreme Court of Pennsylvania. They are in England, whither we can't pursue them, with any hope of recovery. But, sir, in that short period of five years I find no less than five or six instances, in which the summary power has been exercised; and it is reasonable to suppose, that as population became more extensive, instances became more frequent.

In September term, 1741. *Certiorari* to remove an order against John Ross, of Lancaster. On hearing counsel, the Court ordered that the said Ross within one month enter into an obligation of £.100, to the overseers of Hempfield township, conditioned to allow his wife a reasonable maintenance, and thereby indemnify the said township; *or, that an attachment issue against him.*

In April term, 1742. *Rex* vs. *John Ross.* The defendant appeared on an attachment, and entered into a recognizance to appear, &c. at the next Supreme Court.

In September term, 1742. *Same* against *same.* On argument, the Court confirmed their former order, and that he pay all costs, and that he be committed to the sheriff of Philadelphia county until complied with,—that is, not that he should merely pay a sum of money, but that he should be commited to jail *until* he should pay all the money.

In April term, 1744, an attachment awarded against the defendant for denying to pay a bill of costs taxed against him. In September, 1745, an *alias* attachment awarded against the same.

In April term, 1746. Rule, that the sheriff bring in the body of the defendant, which being done, ordered that he stand committed until he answer the complaint of his wife Elizabeth. He was afterwards discharged, *by consent*, on payment of ten pounds and costs.

In September term, 1744, John Taylor and others were bound over to appear at the ensuing Court and attend from day to day, &c. to answer interrogatories.

In September term, 1746—*Thomas Lloyd* vs. *John Parry*, esquire. On the petition of Lloyd against the defendant a justice of the peace, for exercising jurisdiction in the case of a contract respecting the sale of lands. Ordered that Parry appear at the next Court and shew cause why an attachment should not issue against him;—or that an attachment do issue against him. This at the April term following was discontinued by the complainant.

Sir, it is compleatly legible upon the face of the constitution of 1776, that it was intended to continue these powers in the Courts. We find that all these different sections concur. The ninth section declares, that no man shall be deprived of his liberty except by the *laws of the land*, or the judgment of his peers. The twenty-fourth section secures to

the Supreme Court all the powers that had been *usually* exercised by such Courts; and the twenty-fifth section establishes trial by jury *in the same manner as it had before been used.*

If then the Supreme Court had a power before the framing of the constitution of 1776, to punish by attachment for contempts, it has that power in the year 1805; because no act or measure whatever has taken place which tends in any way to abridge it.

The Courts had usually exercised the power of issuing attachments for contempts committed in their view or at a distance, under the act of 1722, until the constitution of 1776 was formed. I gave in the morning my reasons in support of this position, I will not now repeat them.

It appears that there had been some difficulties as to this principle in the state of Delaware; for we find that the learned gentleman who is counsel for the prosecution had been applied to in order to bring a person before the Court in a summary way; but he had doubts as to the propriety of proceeding in that way, and he very properly declined. I believe we shall find, sir, that the constitution of Delaware contains the same provisions that are expressed in the ninth section of the constitution of 1776. [*See seventh section, article first of the constitution of Delaware.*]

In the constitution of 1776, a doubt must have been entertained, as to the extent in which the trial by jury was to be received—whether in *all* criminal cases there must be a trial by jury. That doubt was removed by the convention. The words of the constitution under which we now live is therefore liable to less difficulty of construction. Now, sir, please to look at the difference between the constitution of 1776 and that of 1790, and you will be convinced that the convention of '90 had no object in making that difference, except to do away this very doubt; and here we find that they have expressly restricted the trial by jury to prosecutions by indictment or information. They must have had the principle which we contend for full in view. The party has "a right to be heard by himself and counsel."—That applies to *all* prosecutions—"to demand the nature and cause of his accusation, and to meet the witnesses face to face." That is general also.—"To have compulsory process for obtaining witnesses in his favour." This is general also.—"*And in prosecutions by indictment or information a speedy public trial by an impartial jury of the vicinage:*" Here we find there are two members of the sentence. The first part of the provision being general,

of course, wherever the prosecution is for a criminal offence,—not by indictment or information,—there is no restriction in the constitution, that the trial shall be by jury;—whereas in all prosecutions by indictment or information the party has a right to such trial. It is impossible to have any doubt that those words are to be taken in their technical and appropriate sense, and that "by indictment or information," is meant "by the public prosecutor." To imagine any thing else, would be giving to the word *information* an extent never contemplated by the framers of the constitution.

We next find that "he cannot be compelled to give evidence against himself; nor can he be deprived of his life, liberty or property unless by the judgment of his peers"—(by that only? is there nothing else?—yes—)—"*or* by the law of the land." Having in the first part made provision for all cases that might come in the form of an indictment or information; they then make provision for the prosecution of criminal offences *without* the trial by jury—well knowing that there might be such cases. Therefore they add in the concluding part of the section, that he shall not be deprived of his life, liberty or property, but "*by the judgment of his peers* or *the law of the land.*"

From the date of the constitution of 1776 to 1790, and from 1790 to 1805, we have the contemporaneous, the universal understanding of the legislature, the judiciary, and the people at large, that this is the meaning of the section in both constitutions. How is it possible that all the summary proceedings of the magistrates, all the variety of cases read by Mr. Dallas, should have been contrary to the constitution, and yet that there never has been a complaint against them. Under the old constitution, when the constitutionalists were the predominant party, or when the federalists were so, there was never any thing but a common, a general understanding, that this summary process was legal and constitutional. It was a power which the framers of the constitution thought would not be dangerous; and therefore they said, "so far as there have been these summary proceedings, so far shall you go, and no further." But the circuit Court law is so full, so perfectly explicit on this principle that it leaves nothing to uncertainty. In this act the legislature expressly recognize the power of "*punishing contempts by attachment;*" and this, sir, was after a judicial construction that under the constitution the Court could proceed to punish contempts committed out of their view.

There is an antecedent act (passed in March, 1791.) Now this was in the very first session after the adoption of the

constitution of 1790.—3d vol. Laws, p. 36. Section 10. Here, sir, on suggestion to the Court that the persons subpœna'd live not in the county where the cause is pending before the auditors, the Court *may* "*send their attachment* into the counties where the persons reside," and "proceed against witnesses and others;" (sir, there is no restriction) "who shall be compellable to attend in or be in contempt of such Courts." This sentence contains two distinct provisions—One part refers to those who are compellable to attend—This don't apply to Thomas Passmore's case—but, sir, the latter part will be found in some degree applicable—it refers to all others who may be in contempt of the Court.—Not only those who have been summoned as witnesses; but all others who may be in contempt. It comprehends all and every person, not only jurors, witnesses, or officers of the Court, but all others who may be in contempt of such Court.

Now if the legislature had searched for the most comprehensive terms in which to express their recognition of the law of attachment, they could not have exhibited it in more appropriate language. Here we find the legislature speaking of persons in contempt, as of a known and received meaning.

I now come to the act establishing the circuit Court. *4th vol. State Laws, pages* 362—3. *Sections* 3 *and* 4. The fourth section declares, that "the Judges of the Supreme Court or any one or more of them while holding any circuit Court, shall have power to give judgment, pass decrees, and award execution, and generally have, use and exercise similar power in any cause or suit had before them, and in all cases where jurisdiction is given them by this act, in as ample a manner as if sitting in *bank*."

By this it appears that the Judges of the Supreme Court, while holding a circuit Court, are to have the same powers as when sitting in bank. Now the legislature do not here particularize the power of summary process; but they thought it would be proper to declare in general terms that the judges should exercise all the powers usually exercised by the judges in bank; and they must have known that among those powers was that of punishing contempts by attachment. In the preceding section, after previously directing how appeals may be had, and fixing upon the general return days, they say that "*every* day of the said circuit Courts shall be good return days of process for summoning and obliging witnesses to appear and give testimony in said Court, and summoning and enforcing the appearance of jurors to try issues therein, *punishing contempts by attachments*, and such other writs and process as the said justices shall deem necessary for the advancement of justice, to be made returnable in the said circuit Courts."

Now, sir, they do not here give this power by any particular declaration—they speak of it as a power known and acknowledged. But they give all the powers generally. They give the judges sitting singly the same power of punishing contempts by attachment that they have when sitting in bank.

I refer myself to the learned and candid gentlemen to tell me why the legislature proceeded in this way? and I can't suppose, or conceive of any answer but one; and that is, that the legislature in 1799, knowing this power to be in the Court, that it had been always there, thought it unnecessary to specify it; but after stating the *general teste* and return days on which writs and process should be made returnable, they go on to state that the process of attachment and certain other process, shall be made returnable in the said Court *every* day. All they do is not to vest this power in the circuit Court like the process of a *distringes*, *venire facias*, &c. which are to be returned on the general return days, but that it shall be made returnable *every* day.

I confess, sir, that it is not in my power to make a proposition greater than this is in itself.

I have already said that this "punishing contempts by attachment," cannot refer to offences committed in Court, because those are punished *instanter*; the attachment only issues when the contempt is committed *out* of the view of the Court, in order to bring the offender into Court, that he may have it at his election to answer interrogatories or to submit.

I have, sir, taken up a great deal of time in this argument, and therefore I wish to hasten the conclusion as much as I consistently can,

The case of Bishop Carrol was referred to by my colleague, and it deserves consideration, particularly as it shews that the judges feel themselves bound to exercise this summary power on the complaint of an injured party. The bishop was in Maryland. Those who had acted for him were in the city. He might have avoided an answer to the rule to shew cause; but the bishop from a sense of propriety and honour, thought it his duty to come forward and share with the other gentlemen who had acted according to his directions. The respectability of the bishop's character did not screen him from the rules and usages of the Court. His innocent intentions were no shield. Nothing that can or may affect the due administration of justice must be intruded on the public ear. But after the rule was obtained, sir, there were no thunders of the church; no

publications. Nothing but the most submissive, and at the same time the most upright and honourable conduct on that part of Mr. Cartol and his friends. And here, sir, it was considered as the right of the suitor to have full justice, and satisfaction for injury. Mr. Oellers carried his point against the bishop and the pope, and the rule was not discharged until an accommodation had taken place between the parties.

Sir, allow me to say, that unless we are correct in the ground we have taken, and the principle we contend for, the legislature must have been in the habit of contravening the constitution which was intended to be the rule of their conduct. Now it is not to be expected that they would willingly violate the constitution, nor can I believe that they did; but unless the constitution is to be understood in this way, that an exception was made from the "trial by jury" under the expression "law of the land," many, very many acts of assembly are unconstitutional and void; and this could be exemplified in civil matters as well in the criminal jurisdiction of justices of the peace.

I will now dismiss the constitutional point with a few observations. Pressed as I am for time, I must beg leave to call your attention to certain important, and, I apprehend, conclusive circumstances.

In the first place I will refer to the dissent in which I find the name of one of the honorable managers of this impeachment. *Journal of the House of Representatives, session* 1809-10, *page* 288. Here we find they quote the ninth section of the ninth article of the constitution; and give to it the very explanation which we have given—that trials *by indictment or information* are expressly distinguished from other criminal prosecutions—"that *in addition* to the privileges allowed in *all* criminal prosecutions the defendant, *on an indictment or information*, has a right to trial by jury." Expressly intimating that there were more criminal prosecutions which were not restricted to trial by jury. [*See Appendix, note D.*]

This subject (the ninth article in the last constitution) being brought before the convention of 1790, the Court will recollect that they entered on it with powers of modification, or of expunging the clause altogether. Yet the good sense of that body left it with the single addition of the explanatory words, "*in prosecutions by indictment or information.*" They thought it best with this single addition, to leave it as they found it.

I am sorry I have lost or mislaid a letter received from a gentleman in Philadelphia, of great legal knowledge, for the

purpose of being used on this occasion. I will however endeavour to state the substance. Mr. Gallatin being a member of the convention of 1790, and a leading member, was anxious to have some modification in the constitution, as to the punishment of contempts in a summary manner. He was in the habit of conversing with Mr. Duponceau, and apprized him of his wishes on this occasion. These two gentlemen conferred together, and after considering the subject in every point of view, after several attempts at modification, they gave up the idea,—it being their decided opinion that it was best not to adopt any thing of the kind, lest by attempting to amend, they might do injury instead of benefit.

I am extremely anxious to proceed as fast as possible, but I cannot, at this time, pass over one other important case: It is that of the Doans. [*See Appendix, note* T. 4.] Sir, these men had been proceeded against by outlawry, and were condemned to die. The assembly of Pennsylvania were then sitting. Mr. Findley was a member. In the assembly on the 22d September, 1788, a bill was reported in favour of the Doans. It was to restore to them the trial by jury. The outlawry was of the date of 1780 or 1781. It was said that if a trial by jury was to be had in all criminal cases the law authorising outlawry was in direct contravention of the constitution. But, sir, the legislature would not interpose and declare the outlawry illegal. They knew that a trial by jury was not to be had in all cases. Mr. Findley, being one of the leading members, was so perfectly satisfied of this, and of the legality of the outlawry that he could not agree to the bill, as it would give the men false grounds for their hopes.

Debates, page 131. "Mr. Fitzsimons wished the house to take order on the bill relative to the Doans, because the time was so short, that if the legislature did not interfere immediately, it would be too late, as they were ordered for execution on Wednesday.

"Mr. Lewis hoped as it was a subject of importance, and at the same time of so pressing a nature, the house would proceed with the bill.

"Mr. Findley mentioned his being one of the committee, but that he did not agree to present the bill. He acknowledged the business to be solemn and serious, but did not approve of giving these men false grounds for their hopes. He was against the bill; believing every thing which had been done in their case to have been regular and consistent, and thought a vote on the clause would show the opinion of the house."

You will find, sir, that all parties agreed that the outlawry was not in contravention of the constitution.

"The bill was taken up on the first enacting clause.

"Mr. Lewis arose and observed, that from the concurrent voice of the public, he had not the least doubt but the persons mentioned in the bill were deserving of the most severe punishment, but at the same time, some care ought to be taken, that the legislature act with consistency, and do not through them injure the rights and privileges of the citizens of Pennsylvania.

"Proceedings by outlawry are of great antiquity: they depend not only on the act of our assembly, but on the common and statute law of England; and it is necessary that such proceedings should be authorised. But there is a material difference between the mode of proceeding in England, and the one pointed out by our act of assembly, much more favourable to the liberties of the people of that nation, than the one adopted here is to the people of this. And shall it be said that the rights of the subject is more tenaciously guarded in that country, than they are in this asylum of injured liberty?"

He then goes on to shew the practice in England, and to prove that the law of outlawry is more severe in Pennsylvania than in England. Page 134—"The question was now taken on the clause, which being lost, destroyed that part of the bill, but it was afterwards postponed." It was resumed at a future day, and the bill was lost; and we find that Mr. Findley, and the gentlemen who were of the same political opinions with himself, all agreed that they had no right to interfere in the business. I turn to page 159. [Here Mr. Ingersoll read some remarks of Mr. Lewis, stating "his wish that a bill might be passed to restore the Doans to a trial by jury, but that as the time previous to the execution was too short for that purpose, he meant to move for the appointment of a committee to confer with council, in order to obtain their respite for a few days, until the determination of the house could be known." On motion, a committee was appointed for that purpose, and in page 184, their verbal report is found in these words, "that the committee had performed the duty enjoined on them, they had waited on council and made the request ordered by the house, but are informed that council *have not* thought proper to grant the request which they solicited." "And here," said Mr. Ingersoll, "it is worthy of remark, that Mr. Dickinson, the patriotic Mr. Dickinson, was the president of council. But the law was imperative, and the men were actually executed. This was a case of life and death, and yet

there was a construction put upon the clause of the constitution relative to criminal offences, which will be found in unison with that which we have given.—The Doans had no trial by jury—they were punished by the law of the land." "I thought" said Mr. Ingersoll, "to have made some further observations on this case; but I have merely suggested the hint, and I am persuaded that it will not be misapplied."]

I now proceed to consider with all possible dispatch the second point of my argument:—If the Judges had this power by law, have they exercised it with cruelty and injustice, and in an oppressive manner, from corrupt motives?

I proceed to this point with perfect confidence; because I conceive that the Judges have acted strictly upright and legally correct in every part of this business, except one, and that was in permitting Mr. Passmore, after sentence was passed, to go to his house, without an officer. This indulgence was certainly more than was justifiable,—but it was dictated by humanity.

I yesterday stated, and I stated wrong, that the learned judge had not said the paper posted by Passmore was an enormous libel and required atonement, until it was conceded in open Court, that he was the writer of the libel. I wish to be circumstantially correct, and I trust that the Court will recollect the various periods. In September term, the rule to shew cause is granted, and in December term, Thomas Passmore appears at Court and acknowledges that although he did not write the libel, yet that he put his name to it, and entered it at the coffee-house. Sir, it does not appear that the Judges said any thing at that time, but it does appear by adverting to my notes of the testimony of four or five witnesses, that until subsequent to this confession of Passmore, no hint ever dropt from the chief justice that it was an enormous libel and required atonement. By my notes of the testimony of Moses Levy, esquire, speaking merely of that part of the business, he says, "the Court met on the 8th of December. I appeared in Court and endeavoured to convince them that the paper was not competent evidence to constitute a contempt, as it had no relation to a cause that was to be tried by a jury; it was a case to be decided by the judges alone. On the other side it was contended that the publication alluded to the affidavit of Mr. Bayard, taken before Mr. Inskeep; and the Court decided that as it related to a suit depending in Court it amounted to a contempt. In a day or two afterwards, when the judgment of the Court was given that Passmore was in contempt, I think the chief justice mentioned that it was a gross libel," &c.

Now, sir, if I am correct in this, if the learned counsel will please to turn to the testimony of Mr. Hopkinson, he will find that he states positively, that it was after the contempt had been ascertained and declared by the Court, that the hint was thrown out by the chief justice, and in perfectly mild language.

MR. RODNEY. It is not denied.

MR. INGERSOLL. Then it is taken for granted. Now, sir, there is not a word said by the Court although the interrogatories were ordered to be filed, and the answers had been also filed—not a single word until after Passmore had confessed the libel. Now, sir, we have heard this from Mr. Hopkinson who was a witness on the part of the prosecution, and who is very tenacious of his word. He has told us with a candour that will ever do honour to him, that there was not a word as to atonement until at any rate after the crime was clearly ascertained.

The next, sir, is the attorney-general. That makes three. The attorney-general swore that about the 8th December, the Court heard the argument on the rule to shew cause; that the counsel for the prosecution had called for the judgment of the Court,—that interrogatories and answers had been filed, and on the 27th of December, an argument had thereon; and all this before the Court had made any suggestion about atonement.

These are three of the witnesses—one on the part of the prosecution, and two on the part of the respondents. To the former I will add that of Mr. Sampson Levy, who swore that "on the representations of Mr. Dallas that the libel had been confessed, the Court then, and not till then made use of the observation." [Mr. Rodney here observed that his notes were different. He referred to them; after which Mr. Ingersoll observed that it was precisely as he understood them.]

Now, sir, here we have the testimony of Mr. Moses Levy, Mr. Sampson Levy, Mr. M'Kean, Mr. Hopkinson, all round—on both sides—and did either of these four witnesses hear one word with respect to atonement or the enormity of the libel, until Mr. Dallas had called for the judgment of the Court?

Then, sir, I proceed to consider the suggestion of fact, that Thomas Passmore cleared himself of the alledged contempt by his answers to the interrogatories.

To know whether the contempt is purged, it is necessary to know the charge; for I take it for granted that I have proved that the answers should be full and direct. They are

not to be as to opinion, but to facts, and there must be express denial of every material part. It is with this further qualification that there be no inconsistency on the face of the answers, and there must be no contradiction to a record of the Court.

The charge is made upon the affidavits of James Kitchen and Andrew Bayard, that Thomas Passmore subscribed his name to the libel and affixed it to a board in the exchange-room, in the city tavern. By a reference to the record it appears that the affidavits were filed on the 18th of September, and the argument deferred until the December term. This charge in its full extent as to the fact is acknowledged by Thomas Passmore, in his answer to the third interrogatory—according to my notes expressly acknowledged. [*See Introduction, page* 18.] It was as I understand previously acknowledged by Thomas Passmore in open Court.

The first interrogatory is, "Was there," &c. [*See Introduction, page* 15.] This was dated the 8th of December, 1802, only six weeks after he had assigned the action to John Travis. The answer to the first interrogatory is in these words. [*See Introduction, page* 16.] Before I proceed further let us see whether the fact comprised in this first interrogatory is not acknowledged, for Thomas Passmore ventured to introduce into his answer a question of law. "That such an action had been instituted," &c. Now this is very strange. He terminates his answer to that interrogatory by saying that the suit was determined by a judgment of the 6th of August, although he knew that he had himself on the 6th of September treated it as an action then depending, and had on the 16th of November filed in the prothonotary's office a deposition taken on the rule of the 6th September. In his answer to the second interrogatory which states, that "if such action was brought and is still depending, whether the same was referred," &c. he says, that "*this question, which includes the former, is best answered by a recurrence to the records of the Court.*" (The exceptions, the Court will please to recollect, would suspend all judgments if there had been fifty.) And then he goes into an argument with respect to the judgment;—On this point I leave myself in the hands of the learned counsel, who will follow me; and I am sure he will acknowledge that there is not one particle of evidence, not a single shadow of reason for belief that the judgment put an end to the action.

Now, sir, if the Court please, we are to consider whether, in the first place, he denied the substantial part of the charge—that is, whether a suit was depending at the time he published the libel.

He does not say that at the time there was not a continuance of that suit, and that an argument was to be heard on the question, whether the judgment should be set aside or not. Nor does he deny his knowledge of all that is contained in the record from beginning to end. The test to know whether the answer to the interrogatory is sufficient, is to see whether it is direct. Now I apprehend that what Mr. Passmore calls his answers were not direct. They were, as he says, his belief; and that is not sufficient; there must be no evasion; he must swear positively.

Leach's Crown Law, page 301, gives in the case of a bankrupt the opinion of Lord Mansfield, that a man might be indicted for perjury for swearing to his belief of what he knows must be false. But that is with this restriction:—It is where the party swears to his belief as to a matter of *fact*. But I deny that he can be indicted for perjury, when he swears only to a point of law. It was so with Thomas Passmore. The interrogatory is put to him to state whether there was an action depending on the 8th of September, 1802;—all the facts and proceedings involved in the question he can tell; and yet he only swears to the best of his knowledge and belief, that there was no action depending at that time. Now how can you tell whether he swears falsely or truly?—how can you tell whether he believes or not?—or, can you indict a man for a mistaken belief on a technical question of law?

I will turn to *6th Term Reports*, 120, to shew on this point the opinion of Lord Kenyon, chief justice: "It has been contended on behalf of this person that the answers he gave must now be taken as satisfactory; because if they be not true, he may be indicted for perjury; but how can an indictment for perjury against him be supported, when the secret remains locked up in his own breast?"

How in the name of common sense can an indictment be sustained against Thomas Passmore, for saying that it is his belief that no action was then depending,—when no one can say whether it is his belief or not? He has not sworn to any fact. I call upon the learned gentleman to shew a single case where an indictment was sustained upon such a foundation. Again, sir, in the answers to interrogatories, as of every thing else, you are to take the whole together in order to understand any part. Take all those answers together and he acknowledges not a single particular in which he attempts a denial of the charge. He says, that he believed so, he considered so, he was informed so, and so forth, but he does not confess a knowledge of any essential part whatever.

In *3d Hawkins, page* 272. [In *Leach's 6th Dublin edition, page* 214.] The doctrine is expressly laid down that in order to purge himself of the contempt the man must deny all the material facts charged in the interrogatories—after speaking of the various cases of contempts, he says, " But in all the cases above-mentioned, if the party fully purge himself upon oath, in his answer to such interrogatories of the whole matter charged upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit: But if the party confess part of the contempts in his answer to such interrogatories, and deny others, the Court will not discharge him from the contempts so denied, but will proceed farther to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: Neither will the Court discharge the party upon a shifting or evasive answer to answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it."

The answer to interrogatories which are intended to repel the charge are not to be as to opinion, but to facts and express denial in every part. It is with this further qualification that there be no inconsistency on the face of the answers, and there must be no contradiction to a record of the Court. Subject to these two exceptions I take the rule to be settled, that if the person charged denies the fact imputed to him, directly and plainly, no attachment can issue.

In the first place, therefore, if he did deny a part and did not deny the material charge, of course in the language of the book the Court will not discharge him of the contempt. He has not denied the charge; but has admitted the essential part. Indeed he has admitted the whole. For the charge is that he published the libel while the suit was depending in Court, and of consequence, of the whole charge he has not denied any part; and with regard to the technical part, even if there had been an absolute judgment, and no action, technically speaking, it could have made no material difference. He acknowledges that he knew of the dispute and that is decisive.

If a judgment is entered upon a warrant of attorney in its nature definitive, no action having been ever depending, execution issues, the person who gave the bond comes in and moves to set aside the judgment, the bond having been obtained by force or fraud, and a rule is granted and served accordingly, and the argument postponed until the next Court. In the mean time the creditor undertakes to libel and abuse the person who made the application;—would it be any thing

more than a quibble to say that an action was not depending?

I don't see at present how Mr. Passmore could swear even to the best of his belief that there was no action depending at the time he published the libellous paper, when it was only forty-eight hours after he had obtained a rule to take depositions in the cause. But it seems that this action is like a *will o' the wisp*. It is out Court on the 6th of September, when he obtains the rule for taking depositions. On the 16th of November, it is out again, when he files the affidavit of Edward V. Miller. Out again on the 27th December. On the 6th September, it is *in*, on the 8th it is out—on the 26th October, and 16th November, it is *in*, and on the 27th of December it is *out*.

Indeed I think I am not entitled to take up the time of the Court on a subject that appears to carry conviction with itself.

As to the judgment of the 6th of August, I ask whether he ever did any thing to shew that he considered this judgment as conclusive. For to my recollection no execution was taken out on the judgment of the 6th of August—although judgment had been entered in the office, he never proceeded on it as a judgment. There was no execution taken out on the 18th of August. The execution was taken out on the 19th, on the warrant of attorney signed by Mr. Brown, for Mr. Levy. Why his doubt, or the same thing, his judgment and belief, that the action was at an end on the 6th of August? If he knew that the judgment of the 6th of August was regular he would have proceeded on it alone. But, sir, he knew that it was invalid, that it was a mere nullity; because the report had not been made agreeably to the rule. He knew that if the exceptions were well founded, and in time, they would be fatal to the judgment if not to the whole proceeding. At any rate it was enough that he knew that the question whether the exceptions were sufficient to suspend the judgment, was the very question to be argued on the 6th of September; and he knew at the time he answered the interrogatories that on the same 6th of September he had obtained and entered a rule for taking depositions in the cause. He assigns as the only reason why the action was at an end, that judgment had been entered on or about the 6th of August, and yet it appears by the record that he had a second judgment entered on the 18th, because the one of the 6th he himself considered as a nullity.

In his answer to the second interrogatory he expressly refers to the record as what will best answer it. Here I can't understand him to say any thing more in his favor than that

he is incorporating and making the record a part of his answer. But how could we maintain an indictment on any thing contained in that record, when, though he told you that according to his judgment and belief the suit was at an end, yet he told you at the same time to look at the record? No, his reference to that record is the same as if he had transcribed it minutely and at large, and given it in answer. But no indictment could be supported on this ground. I go further. I contend that if instead of giving his judgment and belief, he had answered positively that no action was depending, but had recited or referred to the record, no indictment for perjury could have been maintained. Thus he is always safe, perfectly safe; because whether there was an action depending, or not, is a matter of record, to be referred to at any time; and if we do refer to it we shall find the amount of his answer. It shews the suit, reference, report, exceptions, setting aside the execution, rule for depositions taken by himself, and a continuance of the cause for argument at the December term.

After referring to the record, he proceeds to state the disputed question whether the action was ended or depending, and his reasons for holding the affirmative opinion. He contends that the exceptions to the report were not filed in time and therefore the judgment must remain absolute. In fact, he goes into an argument, and what I consider an aggravation, he undertakes to particularize. He says, I meant to refer to Bayard's oath of his not having notice of the meeting of the referrees, and in that particular he swore to that which was not true. He proceeds to argue his cause which he knew, and does not deny he knew, was to be decided by the Supreme Court; he proceeds to state all the circumstances; that is, that he had given notice, that Mr. Bayard was informed of the award, that he could prove these things, and in the answer to the question whether there was an action depending or not, he says it was in his judgment or belief not depending. Why, then, can we deny him his belief? It appears that this is a mere hypothetical mode of answering which amounts to nothing. He only tells us what he thought—what he considered—what he believed;—but there is no direct reply. I repeat therefore that he does not deny a single fact charged in the interrogatories, except as to signing and posting the libel. And as to this the amount of his answer is, "So I did, because I took it for granted that the Court would decide against the exceptions." It appears, however, that in a criminal Court of justice we have proceeded to examine questions of a civil nature.

It is now our duty to enquire, "Did the Judges act from corrupt motives, or wilful and intentional error?"

[Here a motion was made that the Court should adjourn. Mr. Ingersoll observed, that if the honourable Court would permit him to go on he would finish in a few moments. The motion to adjourn was repeated, and agreed to.]

FRIDAY, January 25, 1805.

Mr. Ingersoll—in conclusion.

Mr. Speaker,

One single closing observation on the head of constitution. The acts of assembly have been cited by my colleague to shew that there is a criminal jurisdiction in justices of peace, for the purpose of suppressing vice and immorality. If the construction contended for on the part of the prosecution should prevail, then, either all those laws are absolutely unconstitutional and void, and every justice of peace liable to a criminal prosecution, or action;—or we are led to the melancholy inference that numerous crimes are left without a check.

Upon the question whether Thomas Passmore purged himself of the contempt, I have only the following observation to add to those already submitted. A full denial of the whole charge is necessary to the purgation, so that if the facts are not as he states, an indictment may be maintained. The denial must be of a fact which, if not true, the defendant must know to be false. But an indictment cannot be supported, where he swears to the secrets of his own breast, and where the truth or falsehood of his oath is known only to the searcher of all hearts.

A single word of observation also with regard to whether the attachment for contempts is constitutional. It has been said that this offence was indictable, and that an information cannot be supported where an indictment lies. To this I have several answers which I trust will prove satisfactory.

In the first place, there never was an indictment for a contempt of Court. In the great reading of the learned counsel he cannot shew me a single case; and he cannot ask me to prove a negative.

Secondly, this proceeding by process of attachment has not one feature of an information, nor even the most distant resemblance to prosecutions by the attorney-general without the intervention of a jury.

Again, suppose the law to be fairly against me, which I certainly do not acknowledge. But, for argument sake, suppose I have been wrong in every point. This is not a Court of conscience. This Court can only give their judgment in a criminal point of view. They are to decide whether the Judges have acted with intentional error through bad motives. They are to be presumed innocent until they are found guilty, and this principle is acknowledged by the counsel for the prosecution. It isn't the whisper abroad, that their names are to be transmitted with infamy, by the archieves of this Court; it isn't the charges of arbitrary and unconstitutional conduct that is to mark the rule of your decision. You must be governed alone by a general view of the whole circumstances and by the nature of the evidence. It must be clear and full, it must be pointed and such as will have an irresistable effect upon your minds. Evidence is of two kinds, positive and presumptive. We are content to rest on either, although in criminal cases, doubts are decisive against the prosecution. I would do injustice to my clients were I not to speak of their liberality on this head. How often have I heard from those honourable Judges the expressions of pure benevolence. How often have I heard them say to the jury, "in cases of doubt and uncertainty you are not to decide against the accused. You are not to say guilty, until you can lay your hands upon your hearts, and appeal to a just God for your consciousness of the guilt." I trust, sir, that this principle, founded in the gospel of heaven, and inscribed over the portals of justice, will not be denied to them: Wilful error is totally wanting in the evidence. There is not even presumption to support it.

I am content, sir, that Mr. Bayard has been called their friend; but I believe, sir, in the whole course of their lives they have never exchanged with him even the civility of a dinner.

The only circumstance relied upon by the learned counsel to demonstrate wilful error, is not found in the evidence. It is lost for want of fact to support it. The opinion of the Court *followed*, it did not (as was suggested) *precede* the conviction of the defendant. It was after Thomas Passmore, personally, or by his counsel, acknowledged that he subscribed and published the paper denominated a contempt, that the chief justice told him it was a gross libel. The affirmative witnesses are altogether with the defendants on this question, and two of them, Mr. Hopkinson and Mr. Sampson Levy are witnesses summoned on the part of the prosecution.

Severity of punishment has also been mentioned; but this case is agreeably to practice. It is the precise copy of the

precedent in the case of Colonel Oswald, which passed through an ordeal, not only of the assembly, but afterwards of the people by their representatives in convention.

I now come to the circumstance that makes a principal figure in this business. The bee is admired for his sense and subtlety in extracting from poisonous herbs a healing juice; but what inverted subtlety is that in mankind, which could represent to the committee of grievances and to the House of Representatives, the *only door to escape punishment*, as the ground of accusation against the Judges who had pointed it out.

Hurried on by incessant importunity the committee of grievances have in the second and third pages of the report, stated contradictory causes for the imprisonment of Passmore. They state precisely in page two, that he was committed for the publication of the libel—These are the words: "for which libel, the said Thomas Passmore was committed to the custody of the sheriff of Philadelphia county, in the debtors apartment of the common jail." Here it is expressly stated that it was for that publication; and yet in page third, they tell us that it was "not for a contempt of Court, but because he would not apologize or make atonement to Andrew Bayard." I shall have occasion to shew that this originated not with the committee of grievances, not with the House of Representatives, but with Thomas Passmore. *Their* views were honest, but for want of attention to all the circumstances and in consequence of the representations of Thomas Passmore precipitated themselves into the station of prosecutors.

The charge against the Judges is, that they punished Thomas Passmore because he would not make atonement. The sentence of the Court declares the reverse. The contempt in publishing a wanton and gross libel, is the only cause assigned. Who is to be the searcher of all hearts, to undertake to know the motives of the Judges? Who undertakes to assign a secret motive, in direct contradiction to the only expressions used at the moment of the transaction?

Suppose it were to be a matter of a private nature. I have received an injury, and I offer certain terms of accommodation; they are rejected, and I bring my action. Is it because my offers of accommodation were not acceded to, or is it for the injury received? I am content to wave the action if he consents to the terms of compromise; but if he does not consent, I must pursue the action.

If I may without the imputation of levity exemplify the question by allusion to concerns of infinite importance, is it

for not believing, or on account of the sins we commit that we shall be punished hereafter? What Godwin may say on the subject I do not enquire. I leave him in the unenvied possession of the manager; and I believe the common law is not so near the tomb of the Capulets as the works of that author, to whom I sincerely wish a timely repentance.

Sir, is it probable? Is there any circumstance to warrant the supposition, that the Judges would prostitute their offices in the service of private revenge, by surrendering themselves as puppets to be played off at the will of an individual?

Is this atonement a novelty in jurisprudence? Is it so extraordinary, sir, as justly to excite suspition? I read you a case from *3d Burrows*, where reparation of the private injury was inforced, and the sentence on the attachment dispensed with on that account. I am sure that it is not only usual, but as Mr. Levy, the recorder of the Court has told you, it is so much a matter of common course, it is so much in practice, that he should not have thought of it if other circumstances had not brought it to his mind.

Reparation for the injury has always been considered as of the first consequence. It was considered so by the executive of Pennsylvania. There is an instance of it, (and that under the constitution of 1790) where General Morgan had been imposed upon by a forgery in the name of General Heister. On application to the Governor, and upon the return of the twelve hundred dollars which had been paid, pardon was granted. In another instance it was done by the Court in the case of Mr. Bradford, with respect to character.

I trust, sir, that the character of the Judges is a coat of armour against which slight suspicion or weak evidence can never prevail. I beg leave to refer to *3d Wilson, pages 4, 5, 6.* [Mr. Ingersoll read the authority of Judge Wilson, pages 4, 5, 6, and also, pages 29 and 30 of said volume, to shew that "every crime includes an injury:—every offence is also a private wrong"—that "in the punishment of every crime, reparation for the included injury ought to be involved," and that this was considered "as a leading maxim in the doctrine of punishment."]

Had Judge Wilson been present in the case of Passmore he would have thought himself bound to have thrown out sentiments similar to those used by the Court.

I understand, sir, that there was another instance where reparation was taken into view by the executive, an instance

which occurred in this county. It was in the case of a person who had been concerned in a conspiracy to carry off the daughter of a Mr. Sterret. Reparation being made, the fine of five hundred dollars was remitted, and the imprisonment discontinued. This was no longer ago than the last year, and it was by the Governor of Pennsylvania.

Sir, I have found the letter adverted to yesterday, by Mr. Du Ponceau, and I beg leave to read it.

" *Philadelphia*, 15*th Sept.* 1804.

" JARED INGERSOLL, *Esq.*

" DEAR SIR,

" *What you have heard related as having fallen from me, in conversation with some gentlemen of our bar, is substantially correct. It is true that during the sitting of the convention which framed the present constitution of Pennsylvania, a respectable member of that body and myself sat down together to frame a constitutional clause defining the nature and extent of contempts punishable by Courts of justice in a summary manner; that several draughts were produced, which proved unsatisfactory to us, and that after considering the subject in every point of view which then occurred to us, we found it involved in difficulties, and thought it most prudent to leave the matter where it stood, and to trust to the wisdom of succeeding legislatures to remedy what defects might appear in the existing law, as circumstances should point them out.*

" *I do not feel myself at libery to mention the name of the gentleman to whom I allude, I can only say that he is a gentleman of known ability and of republican principles, and that he is entirely unconnected with the legal profession.*

" *I am with sincere respect and esteem,*

" *DEAR SIR,*

" *Your most obedient humble servant,*

" PETER S. DU PONCEAU."

Proofs flash upon us in favour of the construction we contend for, in every way in which we turn ourselves.

Sir, there is another point in which this question may be considered. Wherever a proposal is made and not agreed to, it is the same as not made at all. The business is merely restored to its original ground.

Suppose an individual is grossly injured by another, for which the injured party asks concessions, and he is re-

fused. They fight. Will it be said that it was the refusal of the concessions or the original insult that produced the event?

In the case of Passmore the Judges do not say what they wished him to do; but I do not hesitate to hazard my sentiments on the occasion. He should have said explicitly, that he was much in fault—that he published such a paper, at such a time, against his antagonist, that he regretted his having done it, and retracted what he had said against Mr. Bayard, reserving to himself a full right to urge that and all other accusations against him at the hearing on the argument before the Court. Then, sir, I presume the parties might have gone on, without danger of suffering from prejudice. They would have met upon equal terms. Instead of this, Thomas Passmore in his answer to the interrogatories, specifies particularly the general insinuation in the publication and applies it to what Mr. Bayard swore as to the meeting of the referrees without his having notice. Then, sir, says one Judge, this is an aggravation, instead of a purgation. Well, sir, this is not all. Even after sentence is pronounced, he proceeds to justify all he has done; and the Judges very properly declared that this was adding insult to injury.

Sir, are these the grounds upon which these Judges are impeached? Ought they to be considered as criminal because they decently and in a friendly manner suggested the propriety of an atonement on the part of Passmore? Sir, we have it in the testimony of Mr. Ludlam, in this case one of the officers of the committee of grievances, that the language of the Judges was modest, friendly and advising.

This, sir, is the texture of their offence, which has been clothed in such strong language in order to transmit their names with infamy to posterity. Sir, it concludes with giving Thomas Passmore permission to go to his own house, without the attendance of an officer, and without restricting him to time. Here, sir, they acted an unprecedented part; but I appeal to the good sense of this Senate to say whether it was not an indication of the mild state of temper in the Court. If there ever was an instance in which they acted incorrectly it was this. If the Judges had been mere instruments in the hands of Mr. Bayard, would they have granted to Thomas Passmore an accommodation of this kind? No, sir, if the evidence is to be weighed fairly, that single circumstance ought to operate conclusively in favour of our clients. A doubt could not possibly exist of their mild disposition, nor the question as to wilful error remain for a moment undecided.

The learned counsel with a degree of candour that does honour to his enlightened mind, acknowledged that an impeachment cannot be sustained for an error in judgment. Sir, I go further. I say that even in England under all the bias and influence of prerogative, not even an action can be supported against a judge for an error of judgment. *Salkill* 397. "No action will lie for a wrong judgment in a matter within the limits of their jurisdiction, and a judge is not answerable either to the king or the party for the mistakes or errors of his judgment, in a matter of which he has jurisdiction: It would expose the justice of the nation, and no man would execute the office upon peril of being arraigned by action or indictment for every judgment he pronounces." Sir, isn't this rule of law founded in common sense? Consider the infinite variety of perplexed matters that come before the judges, and who will pretend to say that they should be impeached for error in judgment? Indeed if such was the case the administration of justice must be totally abandoned.

But what is the evidence upon which the charges of arbitrary conduct and wilful error is supported? In the strong language of my colleague, such kind of evidence would not be sufficient to support a prosecution in a Court of petty sessions against a negro wench for stealing her mistress's thimble. It is however a gratification that in the modern administration of justice the prosecution is taken out of the hands of the angry individual and put into the hands of those who will take care that no private passions may interfere in the decision. I shall conclude this by referring to the committee of grievances. They were obliged to listen to *ex parte* testimony on the one hand, and on the other they were desirous of giving the Judges an opportunity of defending themselves. I refer to page third of their report: "Your committee, therefore, in order to afford the said Thomas Passmore the remedy pointed by the constitution for the injury complained of; and also to put those high and dignified officers to their trial, and afford them an opportunity of justifying their conduct to the world if in their power so to do," &c. [*See Introduction, pages* 12, 13.] That, sir, I confess is acting in the true spirit of public prosecutors. They tell you, "we do not undertake to anticipate the sentiments of the Senate; but let the Judges be brought to trial and if they can justify their conduct let them be honourably acquitted." You, sir, and this honourable Court have heard both sides of the question, and you have found that we have repelled every insinuation against the conduct of our worthy clients;—At all events you must allow that they have been perfectly free from corrupt motives and evil intentions.

I have now, sir, gone through with my argument. The subject has been so much exhausted by my learned friend, that it obviates the necessity of my saying more on the occasion. With one or two observations I will take my leave.

Sir, when I take a view of the scenes through which I have passed, the solicitude for my clients is lost, in an anxious concern for the public welfare, in which my little all is embarked. The wheel of fortune is continually revolving, and what may be their fate to day may be mine to-morrow. When I had the honour of being the attorney-general, applications have been made to me for the legal punishment of young men under age who had been guilty of small offences;—but I have not proceeded to ruin their character forever, by bringing them before the Court. I have delivered them over to the master and the father. Sir, I could mention repeated instances in which the child has by this means been saved from public punishment. For this I may have been subject to an impeachment, although from the most deliberate reflection I considered it the best path to pursue. I thought it a moral duty to give these people an opportunity of saving their children from infamy. Sir, it certainly is the interest of the public, that their officers should not on all occasions exercise the full extent of their power and authority.

No man who has a character to lose, or a family to share in his disgrace, will engage in an office which exposes him to unknown perils.

May not the Judges with perfect propriety adopt the language of Lord Strafford, on his trial for treason before the British House of Lords: "If," says he, "I sail upon the Thames, and split my vessel on an anchor; in case there be no buoy to give warning, the party shall pay me damages; but if the anchor be marked out, then is the striking on it at my own peril. Where is the mark set upon this crime? What was the token by which I could discover it?" "Where has this fire been so long buried, that no smoak should appear, until it burst out at once to destroy me and my children?"

What human prudence—what human foresight could have saved the Judges from this impeachment?

I now conclude, sir, hoping sincerely that so much difference of sentiment may not prevail in Pennsylvania relative to the profession of the law and that of agriculture, as has been hinted on this floor. We are all embarked in the same vessel. Let each contribute all he can to the public stock of

happiness; and taking the advice of the Governor as delivered at the commencement of the legislative session, let us join in the cultivation of "peace on earth and good will towards men." With these observations I leave the cause to the good sense of the Senate.

Mr. RODNEY.

Mr. Speaker and Gentlemen of the Senate,

This cause has already taken up a great deal of time. The Senate have heard copious arguments on the law and the fact on the part of the prosecution, and on the part of the accused. It is my duty to conclude the argument.

It is said that from the collision of argument the spark of truth is produced, and I trust that the decision which will be given by this Court, will be satisfactory to themselves and to the public. In concluding this cause I shall endeavor to throw out of it every thing extraneous, in order to save as much of the time of the Senate as is in my power.

The learned counsel, who has spoken last, has not been able to pass over the conduct of the committee of grievances with respect to Mr. Hopkinson. He has endeavoured to persuade us that this is a case in point. But, sir, permit me to say that it is nothing more than the common process of attachment to bring a witness into Court, in consequence of his refusing to attend on a subpœna. They might have produced an host of cases of this kind. It is a usual thing to issue attachments to compel the attendance of witnesses. But, sir, is there any analogy between a simple attachment to bring a material witness into Court and the proceedings in the case of Mr. Passmore, which were of a criminal nature; where the party was brought before the Court, sentenced to thirty days imprisonment and fined fifty dollars. With all the practice and knowledge of the learned counsel for the respondents, I do not believe they can produce a single instance where a witness, who has been brought before the Court by the common process of attachment, has been fined or imprisoned for a single day, much less for thirty days. Notwithstanding that it would be utterly impossible for the Court to proceed without the attendance of such witness, yet, if he does not attend according to the subpœna, I know of no precedent by which he can be committed to jail. They cannot produce a single instance of the kind. According to the provisions of the constitution the attachment that issues for a witness cannot be brought within the pale of the case now under discussion. I beg leave to remark, that even after the challenge to produce a case, they have not produced one like the present. Have they produced a case from

the Court of King's Bench, from the common pleas or Court of exchequer, where they have in this manner punished a person for writing. I know there are cases, in latter days, where the parties have applied to the Court of King's Bench, and they have on information granted a postponement of the trial, in order to give full time for every unfavorable impression to wear away, and that each party might come before an unprejudiced tribunal.

It is true that from some of the chancery books instances have been produced, but I cannot concede that even these apply to Mr. Passmore's case. Here it seems, the Court were tied down hand and foot to the answers of Thomas Passmore, and it seems also that all he swore before the Judges was false; why then, sir, according to the chancery books he might be indicted for perjury—but before this Court the gentlemen tell you that they had no authority to bring such an indictment.

Suppose I were to grant that Thomas Passmore perjured himself, in his answers to the interrogatories: they ought then to have acquitted him of the contempt, and to have proceeded against him for perjury; in which case he would have had a full opportunity of defending himself before a jury of his country. Would not this have been more congenial with the spirit of our republican institutions?

But, sir, is it not extraordinary that this practice of punishing contempts for writing, which has not been pursued in England for half a century, should be planted here as an exotic when it has ceased to flourish in Europe? There has been but one instance of this kind, of any importance, since the era of our revolution—but one case subsequent to the triumph over British tyranny and British subjugation; and the propriety of this decision has been very properly disputed.

If such is the melancholy fact, that the Court have the power of punishing contempts for writing, there is but a very uncertain foundation for the security of the citizen. The gentleman has produced a case to shew that the Court had the power of compelling a person to enter into a recognizance to maintain his wife, and of punishing him for a contempt if he does not do it. Even though they have produced half a dozen of such cases where persons have been brought before the Court for constructive contempts, yet does it appear that they have produced a case of an attachment issuing for a contempt of this kind? —for a mere act of posting? not a publication calculated for general circulation. Is a case of this nature to be found in all the records they have produced? "It is true," say the gentlemen, "that the British Courts of justice deprived us of our

records; otherwise instances enough might be shewn;" but from that time to the present, it is a little singular that no parallel case can be found? Sir, if they had such authorities to shew from any of the late British books, it is well known that they could not be received as law, but only to instruct.

The constitution of 1776, says that "the trial by jury shall be as heretofore." I conceive that this relates to the substance of the trial by jury; not to the indefinite forms of the common law; not to the introduction of unwritten and undefined chancery powers, but to the recognition of this inestimable privilege as a safeguard to the rights of the citizen.

I still say that no case similar to this has been produced. I believe that the rule of proceeding in Courts of justice has been always nearly the same; and yet do you find any case like this on the records of the Court? Although human beings were as likely to be clothed with the imperfections of our nature then as they now are, yet not a single instance of the kind is to be found.

The honourable counsel has adverted to some remarks made by me in the House of Representatives of the United States. A bill was before Congress for the protection of our ports and harbours. It contained a clause that if a sheriff, marshal or constable, while he was carrying the provisions of the act into effect, was killed by any individual he should be punished; but there was some difference of opinion as to the definition of the crime. Some gentlemen wished it to be considered as murder, or manslaughter, as the case might be; others wished it to be considered as murder only; I could not conceive how the same fact could constitute the two crimes of murder and manslaughter, and I contended that a man who in opposition to the law kills another, is guilty of murder and not of manslaughter. But that was on a mere matter of distinction in the law; it was not upon the jurisdiction or the mode of trial. I did not in that case, nor in any other, use any argument calculated to impair the trial by jury; and I believe when the articles of impeachment were brought against Mr. Chase, I voted *against* some; and those that I voted *for*, I supported upon this principle alone; that the accused ought to have a fair and impartial hearing before the jury, both as to the law and the fact.

The case of the Commonwealth against the Doans has been cited. Now if the Court had attended to the whole of this case, and I believe they did attend to all they heard,—but to speak more correctly, if the whole had been read, I believe they would have discovered that these men were not at the time entitled to trial by jury upon any principle whatever.

They had of their own accord relinquished all claim to a trial of that kind. If I am brought up to Court charged with a crime, and I say guilty, the presumption is that an indictment will be found against me and judgment pass. Suppose when this happens that I fly the state, am afterwards apprehended and my identity is proved:—Have I a right to ask for another trial? Am I entitled to it? I have no right to it whatever,—and so indeed did the Court in that instance state, in their *4th reason to the Executive Council.*

"*Fourth*—We conceive, such a mode of attainder compatible with the letter and spirit of the constitution of this state, and that it is no infringement of the *right* of trial by jury; for, that the party had not that trial, was owing to himself; he was not deprived of the right. As well, indeed, might an offender, who confessed the fact in Court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty."

I will put the case in a fair and plain point of view. Suppose an indictment is found against me. I feel confident that there is evidence to establish my guilt. I fly, as I believe that if brought to trial, for want of counter evidence, I should be convicted—It would naturally be inferred, that if my mind was so conscious of the crime, I am guilty. Well, but being assured of evidence in my favour I return voluntarily and surrender myself; then the trial by jury is not to be taken away from me. But if I fly and can be taken *only by force*, I tacitly consent that I am guilty.

The learned counsel divided his argument into two points. The first was, whether the Courts had the power by law to punish Thomas Passmore for the publication of the 8th of September, 1802, as a contempt of Court, by summary process?

Secondly. Have they exercised this authority in a way that was unexceptionable, or in a cruel, unjust and oppressive manner?

I stated when I first spoke on this occasion that it was necessary the paper should bear on the face of it a reference to a cause in Court, and it should be shown that this cause was pending at the time. But, sir, said the learned counsel, it is not necessary that the suit should have been actually pending. It is sufficient if it related to a dispute which was to be brought before the Court, or that might be brought before it; and in support of this he referred to the case of *Pool* vs. *Sackevcral*, in *Pere Williams*, 675.

[Mr. Rodney went into a critical examination of the case; but as our notes here are somewhat imperfect, we rather choose to refer the reader to the case itself, in the Appendix, page 24, than to hazard an incorrect expression of Mr. Rodney's sentiments. We believe, however, that he argued generally on the inconsistency of the case with itself, and particularly on the circumstance that the offer was to any person who would *legally* prove the marriage—that no witnesses came in; and as the Court declared that "they could not have been competent witnesses even if they had come in," no injury could have accrued to the cause.]

But, sir, the gentleman tells you that this publication of Passmore refers to the cause in Court, because it refers to the affidavit, the affidavit refers to the exceptions, and the exceptions refer to the suit itself. I cannot subscribe to this mode of reasoning; it is too remote from the object it is intended to embrace; it reminds me of the house that Jack built; here is the dog, that worried the cat, that killed the rat, that eat the malt, that lay in the house that Jack built. This is all very handsomely jointed and dovetailed. If this paper refers to the affidavit, the affidavit refers to the exceptions, and the exceptions refer to the suit said to be then pending. And notwithstanding it is said that every man in the street, who runs may read it, and that Mr. Kitchen would have known that it referred to a cause in Court, yet as he has not sworn or even intimated that he did know it, we ought to take it for granted that he would not have known, without being told, that it related to a cause in Court, but would have considered it as a common case of posting. Had not Mr. Bayard told him, he never would have known what it meant.

That this publication was calculated to insult the feelings and wound the character of Mr. Bayard, in a most extensive manner, I don't deny. I will not dispute about mere terms nor quibble upon words. But while we are viewing the cases cited by the learned counsel, we are not to take up the time of the Court by adverting to those instances where attachments have issued for the non-payment of money on awards, which in fact operate in the nature of a civil process; nor shall we advert to the case of the king against Beardmore, who was an officer of the Court, and consequently bound to execute its decrees. However the learned counsel, has relied much on a single case, the case of Oswald, in *Dall. Reports*, *page* 319, which really appears to have some application to the case of Mr. Passmore. But it is to be recollected that in the case of Oswald it was fully established not only that there was an action depending in which he was a party at the time he published the libel, but that the libel clearly and expressly referred to that suit. Upon

this principle the Court may have been warranted in their proceeding. I will read a part of the opinion of the Court.

"If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he, who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice,—wilfully seeks to corrupt the source, and to dishonor the administration of justice."

Now to what does the chief justice refer? Does he not immediately refer to the case before him—to a cause then actually depending, and of which circumstance there was no question whatever? This then is the dispute to which he refers, and it will operate in favour of my construction; because it goes to prove that if there was a cause actually depending, and that the publication was calculated to enlist the witnesses or the people in his favour, it was an attempt to corrupt the source of justice; and as such it ought to be punished. Here it was fully proved that the action was depending and that the publication referred to it. But that is not proved by the witnesses in the case of Passmore, and therefore it does not shake the ground of my proposition in the least degree.

To prove that the exceptions were filed in time the learned counsel has referred us to documents. But if they were in time, as I stated before, it has not been proved that Thomas Passmore knew this fact and that in consequence of it the action was still depending. I shall not take up the time of the Court with a repetition of argument to shew that in this case there was a proper remedy; but I will only say that if Thomas Passmore knew this fact he should have been punished, and can yet be punished for it, by an indictment;—The constitution is explicit on this point, that in cases which can be proceeded against by indictment the party is entitled to a trial by jury.

The learned counsel has zealously endeavoured to shew the very beneficial effects of attachments in some instances. But as to his case of the Will, where a man who is disposed to be fraudulent may run off, and deprive the heirs of their money. Why, I apprehend, sir, that he may run off whether this process of attachment is in being or not. As soon as my head's cold he may run off, and I do not know how the attachment can reach him after he has made his escape. But if he has not ran off, security for the faithful performance of his trust may be had by other process than that of attachment.

Although the learned counsel has produced some strong cases in which the process of attachment was of service, yet I do not see that even allowing those to be taken as precedents the benefit could equal the injury to the rights of the citizen, evidently resulting from the practice now contended for. It appears the gentlemen have gone further, and contended, that even though there is no suit depending, and a man writes any thing reflecting on the court, it is a contempt; as is laid down in Strange and in Pere Williams. I do not see why the judges should be clothed with this inviolability, any more than the senate, the house of representatives, the governor, or the president of the United States. I hope the gentlemen do not mean to extend their arguments in this way, that you may be brought up by this summary mode of proceeding, for every expression you make relative to the judges or the party.

According to the gentleman's doctrine, even innocence is no shield for a man's liberty. By innocence here, I mean truth. A man may find himself aggrieved in an outrageous manner, by a man with whom he has a controversy at law—he publishes something relative to the character of his adversary, and if brought before the judges he could be fined and imprisoned even though his assertions were true. I really thought the argument on this point was of an elastic nature, as well from the reasoning as from the authorities adduced. I need not undertake to shew that almost all the British doctrines which have been furnished are either ancient in themselves, or founded upon remote precedents in the common law. To form an opinion of the rigour of some parts of this law, I need not appeal to barbarous times, to the sanguinary and corrupt ages of the old common law; but I can prove that even now in England, according to the common law, if a man strikes another in the presence of the court, he is to lose the offending limb.

The learned counsel has cited a passage from Shakespeare to shew the purity of the administration of justice in Great-Britain. In that case he tells the prince, "I represented your father, sir—I was the image of his power—you struck me on the bench of justice, and as an offender to the king I committed you." Would not the same judge have punished any other offender in the same way?

Now I can make use of one observation here that the counsel have not shewn us, in the books, where this practice is recognized. Mr. Tucker is silent on the subject, from which I might draw an inference that it did not exist, although I think that this is an incorrect and vague mode of reasoning. But I don't think that Mr. Tucker would have passed this circumstance over in silence, if he had known that it had ever exist,

ed. Judge Blackstone has not taken any notice of such practice. But the reason for punishing this crime, it seems, was because the court represented a relique of royality; and that we are told is the reason why the chief justice proceeded to punish the prince of Wales.

The learned counsel have endeavored to shew that this summary power was authorized by Common law and for this purpose 2 *Atk.* 469, has been referred to. [*See Appendix, note G. ft.* 7.] To this case I replied and I thought conclusively; but it has been reiterated and enforced with great ingenuity. I will not however say any thing in rejoinder. I merely state that the arguments of the gentlemen have not changed my opinion, I will recur to the case of the king against Beardmore. 2*d Burrows* 792. [*See Appendix, note* K. *ft.* 14.]

This was produced, as I understand, to establish two points —first to shew the right of punishing contempts by summary process; second, to shew the nature of the contempts punished in this way.

I may make a remark relative to this case, that if we were compelled to follow the precedent, and if the doctrine of attachment for contempts, amounts to one half the extent that is claimed in this instance, we should indeed be lamentably situated. But if we *had* pillories and whipping-posts, in this country, which we have not, owing to the humanity of our laws, the case could scarcely have received such a decision here as Mansfield gave it in England. This case wss certainly very hard. The man swears that he had executed the sentence of the court, according to the usual manner, and, that he believed it to be a full execution of the rule; but, notwithstanding, this, the court of king's bench say, you have not cited any instances of this being the usual manner. But let me strengthen my argument by attempting to shew how they conceived themselves justified in executing other sentences. Mr. Howard among other things mentions the practice of burning in the hand with a red hot iron. He states that it is constantly and notoriously done with the knowledge of the judges and in the face of the court with a cold iron, and I believe this has been the practice until within the last eight or ten years. In cases of manslaughter, larceny, even in the presence of the court, it was the practice merely to clap a cold iron on the offender's hand. Let me ask, if the rule of executing sentence is to be strictly pursued, the sheriff is justified in executing the sentence in this manner? Yet it seems that swearing he had executed the sentence in the usual manner, could not give satisfaction with respect to the officer who put the man in the pillory; for, lord Mansfield says, why did not you state the

cases in which sentences had been executed in this way?—"the offender was no more in the pillory than the footman who stood by him."

I will now take up this case in the strongest point of view, as compared with that of Thomas Passmore, with the arguments of the gentlemen on it. They have attempted to prove that Mr. Passmore knew there was a cause pending at the time he swore to those answers to the interrogatories. If he knew of the suit being in court, must he not have sworn in the face of the fact. If so, could they not have proved his knowledge of the fact and maintained an indictment for perjury? But here they say he does not swear as to the fact, he swears as to his belief of a point of law. But I contend that the interrogatory related to a matter of *fact*. He was to say whether or not the suit was depending at the time; and he answers according to the best of his judgment and belief that there was no cause pending. Whether the action was depending or not was a fact which could be clearly ascertained.

Mr. Justice Forster, and Mr. Justice Wilmot, concurred in the opinion of lord Mansfield. [Here Mr. Rodney referred to their opinion—see appendix, page 17.] I read this to shew, that at this time Mr. Beardmore was obliged to answer to interrogatories, and that this was the practice at that day. I advert to this particular fact, to shew, that in the 32d year of George the second, I believe about thirty years before the time of lord Earlsfort—however in the 32d year of George the second, it was considered not to be the privilege of the accused to ask for interrogatories; but that he was bound, according to the rules of the court, to answer them. We therefore find that the cases before lord Earlsfort, as reported in Vernon and Scriven, will not bear the gentleman out with his doctrine.

It would seem from the reasoning of the opposite counsel, that a person cannot be indicted for perjury, when he swears to the best of his belief; nor would his swearing positively to a single fact let him purge the contempt, although he might be indicted for the perjury. I think that 1st Strange, page 185, is one of the cases which was relied on by lord Earlsfort. That case does not apply. This is plain upon the very face of it, as there was no rule to shew cause and consequently no interrogatories. The next case is, 1*st Strange, page* 444.

Dominus Rex versus *Barber*. The defendant had "presented a *petition* to the common council of London, reflecting upon one of the alderman, and used contemptuous *words* of this court at the same time. For the petition the court granted an information against him and those who signed it; and for the contempt an attachment."

Here it will appear that the court did not grant an attachment for the writing. For *that* they granted an information. This is also a case cited to shew that the interrogatories are the privilege of the accused. Let us see what it proves.

"The prosecutor, in his interrogatories, asks him if *he* did not present the petition and use such and such words. And now the defendant moved that the interrogatory, as to presenting, might be struck out, because it is making him accuse himself of that which will convict him of the libel." *Et per curiam.* He is not obliged to answer it; you may ask him, whether, when the petition was presented, he did not say so and so; therefore let that part of the interrogatory be struck out."—Surely, sir, I am correct in what I contend for as to this part of the argument. Here, sir, for the petition an information was granted, and for the contempt an attachment. Thomas Passmore's libel on Mr. Bayard was all his crime, and that should have been proceeded against by indictment. He had not used any contemptuous words against the court, to subject him to an attachment.

With respect to answering the interrogatories, this case clearly shews, that a party is not bound to answer an interrogatory that may convict him of another offence; and this Sir John Strange confirms, when he says, "N. B. I drew them" (the interrogatories) "up as the court now settled them, but that question was put in after they went from me, though I cautioned the attorney against it."

But it seems that in 3d Burrows, there is a case which is much relied on by the counsel for the respondents; let us proceed to examine it.

The court will please to recollect, that there is a difference between an attachment for a criminal offence, and an attachment for a civil proceeding. Judge Blackstone takes the particular distinction, "those committed by parties to a suit or proceedings before the court, or by disobedience to any rule or order," &c. [*See Appendix, page* 4.] Here then is a distinction between attachments of a criminal nature, and those in civil cases, although they are both carried on in the name of the king. Now let us look at this case of the *King* versus *Wheeler*. Here two parties entered into a rule of reference, and by that rule it was agreed that neither party should file any bill in chancery. Notwithstanding this agreement, the defendant flew into the face of a rule of reference, and filed a bill. Now does not judge Blackstone say, that for violating a rule of reference, or for violating any other rule, these attachments are to be considered as of a civil nature. Why what do they do?

he might have been indicted for it. The learned gentleman says, that it was not to a matter of fact, but to a question of law. But I am of a different opinion. I never yet knew any man called upon to swear to a point of law. Mr. Bayard there swears that the suit is still pending, and the learned gentleman says that this is a mere question of law. They do not prevent Mr. Bayard from swearing to a question of law, although they do Mr. Passmore. When I turn to the interrogatories, I find, unfortunately for the gentleman's argument, that the question is so worded in the very first one, that it imperiously implicates a matter of fact. "Was there an action depending," &c. [*See introduction, page* 15.] I think, sir, I have the opinion of my learned friend as to its being a matter of fact. The question embraces this particular point, was the action depending or not, and it appears to be a thing known to the gentleman as a fact; and they wished Thomas Passmore to be acquainted with that fact, in order to establish the guilt.

Was it a matter of *fact* yesterday, and a matter of *law* today? Was it like the pendulum of a clock moving from one side to the other? It is impossible to change its texture with every instant. It was a question of fact too whether Mr. Haslet was authorized in the agreement to enter into this business as the umpire. It was a question of fact, also, whether—

MR. DALLAS. The learned counsel has so mistaken my meaning, that I beg leave to explain. I never said—I never doubted that there was an action depending; but I have always said that the operation of the judgment was a question of law. The question I put there, sir, was a direct one, "was there an action then depending?" The answer he has given is an evasion.

MR. RODNEY. The question contains two matters of fact. The first is, was there an action depending. The second, when was it instituted? Let us see his answer. [1 *answer; for which see introduction, page* 16 *of this book.*] His answers are sufficient to incur the penalty of the crime of perjury agreeably to the book, if he answers to matter of fact, to the best of his belief. But, sir, he not only swears to the best of his belief, but he goes on and gives the reasons for his belief. If I swear positively, in contradiction to the charge, this would stop the proceedings for contempt and expose me to a prosecution for perjury; but if I give false reasons for false swearing, I presume it is much worse, and it is an aggravation of the perjury.

Let us see then how he does swear. [*Reads answers to interrogatory.—See introduction, pages* 16, 17.] But, say the gentlemen, there *was* an action pending; his reasons are equally as false as his assertion, that no suit is in Court. Well, then, take your remedy. Indict him for perjury. Well, but say the gentlemen, these answers are evasive, they do not go to the point. He must acknowledge or deny the facts. What are the facts? *The publication of the paper, and that an action was depending.* The fabric stands on these two pillars, remove one of them and the whole falls to the ground. Agreeably to the doctrine laid down in Dallas' Reports, the oath of the accused in denial of the fact is better than the testimony of a thousand witnesses. Now at this rate, if he swears positively that no action is pending, and even though he were ignorant, couldn't they indict him for perjury? But I ask whether an ignorant man could be found guilty in such a case? I will put the case stronger. Suppose a robber breaks into a house, and the man of the house in defending his property murders one of his own domestics, one of his own children, or even his own wife; why his ignorance of the fact excuses him. A man is to be excused for ignorance of the fact in cases like these. Now suppose Thomas Passmore was ignorant of the fact, can it be said that he was guilty of a contempt when he put up the paper? Certainly not for the contempt was ignorantly committed. It would indeed be indulging a latitude for contempts which would render every man insecure. But taking it for granted that he published a paper referring to a suit which he believed to be at an end, but which was not at an end,—will this Court say that for this he is guilty of a contempt and criminally answerable?

Adjourned.

SAME DAY, *P. M.*

Mr. Rodney—in conclusion.

Mr. Speaker and Gentlemen of the Senate,

I shall be very brief, Mr. Speaker, in the observations that I shall make; and I have to request of this honorable Court, that if in any of the remarks I have made as to the evidence, or the authorities, they should doubt my correctness, they will examine for themselves with a scrutinizing eye; and I beg the Senate not to pay any further attention to them, than so far as they find them supported upon clear and unquestionable ground. If I am incorrect from any inferences I have drawn, I hope they will decide, as I am sure they will, perfectly unbiassed. I shall be very brief, for this particular reason, that this Court must feel fatigued with the length of the arguments, and the number of cases which have been cited.

I am confident that they have paid so much attention to the whole subject, that they are at this time as competent to decide as they would be by any additional observations I could now make.

I was, this morning, commenting on the answers of Mr. Passmore to the interrogatories. Much has been said as the insufficiency of those answers to purge the contempt. I shall only now remark, that I agree perfectly with Mr. Lewis, on this subject, that the answer to those interrogatories went to purge the contempt, because, according to Thomas Passmore's belief, they were full as to the material facts charged; and whether he testified truly or not could only be inquired into in a prosecution for perjury.

With these observations I come to consider the constitutional part; and I must observe, that notwithstanding I respect many of the authorities that have been cited by the learned counsel, they may be considered as a dark lanthron when compared with the bright lamp of the constitution. The counsel for the respondents have adverted to the 9th section of the bill of rights. They say, that in that section a distinction is taken between *criminal prosecutions*, where the accused hath a right to be heard by counsel and to have witnesses in his behalf, &c. and those cases where, *in prosecutions by indictment or information*, a speedy public trial by jury must be had.

The constitution, section 9, reads in this way. [*See last page Appendix.*]

Well, sir, I agree that the distinction here taken by the gentleman is correct. But what does the next article say? According to my opinion, this article is as luminous as a sunbeam itself. It is the same, I think, *verbatim et literatum*, as that contained in the constitution of Delaware.

"SECT. X. That no person shall, for any indictable offence, be proceeded against criminnally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his Representatives, and without just compensation being made."

Now let me ask whether this publication was or was not an indictable offence? if it was an indictable offence, it ought to have been proceeded against by indictment only; although you say it may be proceeded against by information, nay, by at-

tachment itself, yet if it is an indictable offence it must be proceeded against by indictment; for the constitution says, you shall not proceed by information where an indictment will lay. But, says my learned friend, did you ever hear of a contempt being punished by indictment?

But if every thing that enters into the constitution of the offence is to be taken into view, and the constitution of Pennsylvania says that no person for an indictable offence shall be proceeded against criminally by information, you cannot proceed against this offence in any other way than by indictment. You cannot expound the constitution in any other way. It would puzzle the sylph who used to solve the riddles of Oedipus to do this. If my arguments do not convince this honorable Senate that I am right, in this particular, I beg them to read attentively for themselves, and I am sure they will then find me correct.

The gentleman gave a definition of an indictment and I gave the same, by implication. It is a paper drawn up by the attorney-general and presented to the grand jury. If properly supported before them, a bill is found, it is presented to the Court, and then comes before a petit jury for their final decision; but the framers of the constitution used it on a larger scale when they directed that all indictable offences should be proceeded against in no other way. Now, did any man ever hear of the attorney-general drawing up an indictment for an offence committed in the militia? Though I was young, yet there are gentlemen old enough who hear me, who served as soldiers in the revolution, who would be likely to know if such a transaction had taken place; I ask if any of them ever knew the attorney-general either presenting an indictment or filing a strictly technical information against an offender in the army? No, sir. The framers of the constitution must have used this term in a more extended sense. They wished to restrict the prosecutions, as far as they possibly could, to indictment, and a trial by jury; and will this honorable Senate give sanction to a construction, which says, that even if it is an indictable offence, the party entitled to jury trial, may be proceeded against in a summary way, without a trial by jury?

The learned counsel, who spoke first for the respondents, has stated three courses that may be pursued, the first by indictment, the second by a civil action, the third by attachment for contempt.

MR. DALLAS. I did not say he could be *indicted* for a contempt, sir.

MR. RODNEY. I believe I am stating the gentleman's observations correctly. The gentleman said it was punishable in all those three ways,—by indictment, by civil action and by attachment. But my argument is, that the offence, notwithstanding it might be punished by attachment, was indictable, and the constitution says that if an offence is indictable, it shall not be proceeded against in any other way. I am very sensible, that I differ on this subject with my learned friend, but I do not pretend to equal his judgment or experience;—nor yet is any man infallible. I beg you, sir, and the gentlemen of the Senate, to look at the arguments on both sides, and to draw your own inference.

I forgot, sir, while I was on the subject of the purgation to advert to the opinion of Mr. Lewis.

He says, "I think *the judgment did not put an end to the action*, and *that it was depending* at the time of your publication on the 8th of September last. If so, and you had a knowledge of it, that publication was certainly *a high contempt*, for which an attachment might legally issue, and *punishment be legally inflicted*. But I think your answers to the interrogatories entitled you to a *discharge* from all further proceeding under the attachment, however they might subject you to a prosecution for perjury if they were intentionally untrue.

"I take it to be the clear and settled law, that in all cases of proceedings by attachment, "if the party *fully purges* himself upon oath in answer to the interrogatories of *the whole matters charged* upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit." 2 *Hawk. P. C. cap.* 22. *s.* 1. In the case of the Commonwealth v. Oswald for a contempt, [1 *Dall. Rep.* 328.] the counsel in support of the prosecution said, "It is incumbent upon the person who suggests the contempt, to prove it by disinterested witnesses."

Sir, in the case of Oswald there were two witnesses, one proving that he got the paper at his office fresh and damp from the press; and the other, Col. Proctor, as to Oswald's *knowledge* of the suit being still pending. But, sir, were there such disinterested witnesses against Thomas Passmore?

"And then the defendant is allowed by his own oath to purge and acquit himself; in spite of all the testimony which can possibly be produced against him. The Court employ no compulsion in this respect. He may either answer or not as he pleases. If he does answer, his single oath in his own favour, will countervail the oaths of a thousand witnesses."

His single oath, sir, is to countervail the oaths of a thousand witnesses. Indeed this is not so strong as some of his observations in the case of Mr. Oswald, to all of which the chief justice gave his sanction.

In the case of Oswald, Mr. Lewis observed, that

"As a misrepresentation had been industriously spread abroad repecting the conduct of the court, he thought it proper, at this time, concisely to state the real nature of the present proceedings. It has been asserted that the court were about to compel Mr. *Oswald* to convict himself of the offence with which he is charged: but the fact is this, that it is incumbent upon the person who suggests the contempt to prove it by disinterested witnessess; and then, indeed, the defendant is allowed by his oath to purge and acquit himself, in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. *Oswald's* being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done) but to enable him to avoid the punishment which is the consequence of it. The court employ no compulsion in this respect. He may either answer, or not, as he pleases: if he does answer, his single oath, in his own favor, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the judgment of the court must necessarily follow."

The chief justice says,

"Your statement is certainly right, and the misrepresentation, which is attempted, must either be the effect of wickedness, or ignorance."

Was not then the single oath of Mr. Passmore sufficient to purge the contempt?

The only remaining point is to shew whether there was any intention of arbitrary conduct or wilful error in the Judges of the Supreme Court, and, sir, I should do injury to my feelings, my conscience or my character, to stand up and assert that these gentlemen have been guilty of wilful and arbitrary misconduct—on the contrary I will give them cheerfully that privilege, which they are entitled to, of being presumed innocent until they are found guilty. This, sir, is but an act of justice.

Now let us see if there are any circumstances which go to shew that the Judges have acted wilfully corrupt.

The manager has made a number of judicious observations on this subject, and has consequently left me the less to say. I stated, sir, that there were two positive witnesses to one particular fact—"that when Passmore came before the Court, and before the confession of the fact of publication, the chief justice said, Mr. Passmore, you are guilty of an enormous libel." Now

the same maxim that I have given to the honourable counsel for the respondents, permit me to claim for Mr. Passmore. Should he not, sir, have been presumed innocent until he was found guilty? Now, notwithstanding that this is consistent both with law and gospel, and is sanctioned by that divine providence of the Deity which protects the poor as well as the rich, yet do we here find it denied to Thomas Passmore.

Sir, there were two positive witnesses to this point, and I think another at least, as strongly corroborative as he possibly could be.—The following is part of the testimony of Mr. Sampson Levy.

"That rule to shew cause was returned at the next supreme court, which I think was on the 8th of December of the same year; Mr. Passmore appeared agreeably to the rule in court, I believe at that time, to the best of my recollection, the court were applied to, to proceed against Mr. Passmore immediately; a discussion took place, however, before that; the court upon the application of one of the counsel of Mr. Bayard stated to Mr. Passmore the nature of the offence he had committed in libelling gentlemen of the character and respectability of Messrs. Pettit and Bayard as he, Passmore, had done; the Chief Justice made several observations on the impropriety of his conduct, which roused the attention of Mr. Passmore, and he applied to his counsel, supposing the court had taken it for granted that he was guilty, and wished the assistanee of his counsel, or his interference in his behalf."

Now, sir, does this look like his confessing the fact? Doesn't it shew the direct contrary. Mr. Levy says upon the application of counsel the Court addressed him. Now, sir, however respectable the counsel might be, the Court were not authorized to proceed in this way. Mr. Levy tells you that Mr. Passmore appealed to his counsel, being *apprehensive* that the Court thought him guilty. Does this prove, sir, that the confession of Mr. Passmore was *before* the declaration of the Judges, or does it prove to the contrary?

Mr. Passmore, upon the mere rule to shew cause, ought, in the view of the law, which commands even the very Judges, to have been presumed innocent.

What is the amount of this testimony? Why, in the first place, he is accused as a guilty man, and in the next place, he must prepare himself to make an handsome apology.—And what is produced by the testimony of Mr. Hopkinson? Why the testimony of Mr. Levy is corroborated.

Sir, I ask, if this is evidence upon which you could convict a negro wench in a Court of petit justice, for stealing her mistresses thimble? No, sir, I suppose that this is not testimony upon which you could convict the lowest wretch in the community of the most frivolous crime.

Mr. Passmore's testimony ought also to be regarded; but if he is considered as interested from motives of resentment, what is to be said to that of Mr. Henry? The Court have heard his testimony and its agreement with that of Mr. Levy. They will make up their minds upon the business, from a close view of the testimony.

It is certain that there has been a disagreement in the witnesses as to the point of time; but it is equally certain that in almost every instance where two persons are examined, on one subject, there will be some particular points upon which they will disagree, such as, one fixing the transaction at one time, and the other at another.

The learned counsel has stated in very pathetic terms, the case of Mr. Bayard; he has really stated his situation in the most feeling language; but did he not recollect that Mr. Passmore also had feelings; that he had a family and friends as well as Mr. Bayard? Was there no bosom to heave a sigh, no heart to feel a pang, nor no eye to weep for him. Surely the learned counsel will allow, that even

> " — the poor beetle that we tread upon,
> " In corp'ral sufferance finds a pang as great
> " As when a giant dies."

My only wish, sir, is, that the supreme ruler of the universe, while he protects innocence, will punish wilful error—and that this Court, while it protects the character of the Judges, will at the same time protect the liberties of the citizen.

CONCLUSION.

Mr. Rodney finished his speech at about four o'clock, P. M. on Friday. The Court adjourned until the next day (the 26th) when being again met, Mr. W. Reed, a Senator, addressed the Court in these words:

Mr. Speaker,

When we consider the importance of the question which we are now called upon to decide; when we consider the length of time that is taken up in the discussion; when we take into view the number of witnesses that have been examined on this subject; and the copious arguments of counsel and others on both sides of the question, it can hardly be expected that every individual of this Court is at this moment prepared to give his vote. For my part I should wish to take a little more

time to consider on it, and I believe it to be the case with others; and in order to know whether this indulgence will be given or not, I move you, sir, that this Court adjourn 'till Monday morning, at twelve o'clock.

This motion was agreed to.

The Court met on Monday, at noon, when Mr. Reed again addressed the Court, as follows:

Mr. Speaker,

We have now come to a very important stage of this business. We are now about to give our vote, by which vote we must either acquit or criminate the party impeached. In order, sir, that we may have that accusation in full view before us, previous to passing the sentence, I move that the clerk read the article of accusation and impeachment.

The article of impeachment was then read, after which Mr. Whitehill, the Speaker, put the question, "Are the Judges guilty or not guilty as charged in the impeachment?"

The clerk called over the names of the members.—The following is the result of the vote.

NOT GUILTY.		GUILTY.	
James Brady,		*Joseph Hart,*	
James Gamble,		*Jonas Hartzel,*	
James Harris,		*Gabriel Heister,*	
John Heister,		*William M'Arthur,*	
Edward Heston,		*Daniel Montgomery,*	
John Kean,		*Thomas Morton,*	
Pressly Carr Lane,		*John Piper,*	
Christopher Mayer,		*John Porter,*	
Thomas Mewhorter,		*William Reed,*	
William Pennell		*Rudolph Spangler,*	
John Richards.	11.	*John Steele,*	
		Joseph Vance,	
		Robert Whitehill.	13.

The constitution requiring two-thirds of the members present, to convict the Judges, Mr. Whitehill, the Speaker, said

Gentlemen of the Supreme Court,

The Clerk reports, that you are acquitted of the charges exhibited against you by the House of Representatives.

APPENDIX.

[A.]

Tucker's Blackstone, vol. 1. p. 64, 65, 66.

THE monuments and evidences of our legal cuſtoms, are contained in the records of the ſeveral courts of juſtice, in books of reports and judicial deciſions, and in the treatiſes of learned ſages of the profeſſion, preſerved and handed down to us from the times of higheſt antiquity. However, I therefore ſtile theſe parts of our law *leges non scriptæ*, becauſe their original inſtitution and authority are not ſet down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial uſage, and by their univerſal reception throughout the kingdom.

Our ancient lawyers, and particularly Forteſcue, inſiſt with abundance of warmth, that theſe cuſtoms are as old as the primitive Britons: and continued down, through the ſeveral mutations of government and inhabitants, to the preſent time, unchanged and unadulterated. This may be the caſe as to ſome; but, in general, as Mr. Seldon, in his notes obſerves, this aſſertion muſt be underſtood with many grains of allowance; and ought only to ſignify, as the truth ſeems to be, that there never was any formal exchange of one ſyſtem for another: though doubtleſs by the mixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they muſt have inſenſibly introduced and incorporated many of their own cuſtoms with thoſe that were before eſtabliſhed; thereby in all probability improving the texture and wiſdom of the whole, by the accumulated wiſdom of divers particular countries. Our laws, ſaith Lord Bacon, are mixed as our language: and, as our language is ſo much the richer, the laws are the more complete.

And, indeed, our antiquarians, and early hiſtorians do all poſitively aſſure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred, the local cuſtoms of the ſeveral provinces were grown ſo various, that he found it expedient to compile his *dome book*, or *liber judicialis*, for the general uſe of the whole kingdom. This book is ſaid to have been extant, ſo late as the reign of King Edward the fourth, but is now unfortunately loſt. It contain-

ed, we may probably ſuppoſe, the principal maxims of the common law, the penalties for miſdemeanors, and the forms of judicial proceedings. Thus much may at leaſt be collected from the injunction to obſerve it, which we find in the laws of King Edward, the elder, the ſon of Alfred.

But the irruption and eſtabliſhment of the Danes in England, which followed ſoon after, introduced new cuſtoms, and cauſed this code of Alfred, in many provinces, to fall into diſuſe; or at leaſt to be mixed and debaſed with other laws of a coarſer alloy. So that about the beginning of the eleventh century, there were three principal ſyſtems of laws, prevailing in different diſtricts. 1. The *Mercen-Lage*, or Mercian laws, which were obſerved in many of the midland counties, and thoſe bordering on the principality of Wales, the retreat of the ancient Britons, and therefore very probably intermixed with the Britiſh, or Druidical cuſtoms. 2. The *West-Saxon-Lage*, or laws of the Weſt-Saxons, which obtained in the counties to the ſouth and weſt of the iſland, from Kent to Devonſhire. These were probably much the ſame with the laws of Alfred above mentioned, being the municipal law of the far moſt conſiderable part of his dominions, and particularly including Berkſhire, the ſeat of his peculiar reſidence. 3. The *Dane-Lage*, or Daniſh law, the very name of which ſpeaks its original and compoſition. This was principally maintained in the reſt of the midland counties, and alſo on the Eaſtern coaſt, the part moſt expoſed to the viſits of that piratical people. As for the very northern provinces, they were at that time under a diſtinct government.

Out of theſe three laws, Roger Hovedon and Ranulphus Ceſtrenſis inform us, King Edward the Confeſſor extracted one uniform law or digeſt of laws, to be obſerved throughout the whole kingdom; though Hovedon and the author of an old manuſcript chronicle aſſure us likewiſe that this work was projected and began by his grandfather King Edgar. And indeed a general digeſt of the ſame nature has been conſtantly found expedient, and therefore put in practice by other great nations, which were formed from an aſſemblage of little provinces, governed by peculiar cuſtoms. As in Portugal, under King Edward, about the beginning of the fifteenth century: In Spain under Alonzo X. who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial cuſtoms into one uniform law, in the celebrated code entitled *Las Partidas:* and in Sweden, about the ſame era; when a univerſal body of common law was compiled out of the particular cuſtoms eſtabliſhed by the laghmen of every province, and entitled the *lands'lagh*, being analogous to the *common law* of England.

Both theſe undertakings of King Edgar and Edward the Confeſſor, ſeem to have been no more than a new edition, or freſh promulgation, of Alfred's code, or dome-book with ſuch additions and improvements as the experience of a century and an half had ſuggeſted. For Alfred is generally ſtiled by the ſame hiſtorians the *legum Anglicanarum conditor* as Edward the Confeſſor is the *reſtitutor*. Theſe however are the laws which our hiſtories ſo often mention under the name of the laws of Edward the Confeſſor; which our anceſtors ſtruggled ſo hardly to maintain under the firſt princes of the Norman line; and which ſubſequent princes ſo frequently promiſed to keep and reſtore as the moſt popular act they could do, when preſſed by foreign emergencies or domeſtic diſcontents. Theſe are the laws that ſo vigorouſly withſtood the repeated attacks of the civil law; which eſtabliſhed in the twelfth century a new Roman empire over moſt of the ſtates of the continent: States that have loſt, and perhaps upon that account, their political liberties: while the free conſtitution of England, perhaps upon the ſame account, has been rather improved than debaſed. Theſe, in ſhort, are the laws which gave riſe and origin to that collection of maxims and cuſtoms, which is now known by the name of the common law. A name either given to it in contradiction to other laws, as the ſtatute law, the civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus Commune* or *folk-right* mentioned by King Edward the elder, after the abolition of the ſeveral provincial cuſtoms and particular laws before mentioned.

But though this is the moſt likely foundation of this collection of maxims and cuſtoms, yet the maxims and cuſtoms ſo collected, are of higher antiquity than memory or hiſtory can reach: nothing being more difficult than to aſcertain the preciſe beginning and firſt ſpring of an ancient and long eſtabliſhed cuſtom. Whence it is, that in our law the goodneſs of a cuſtom depends upon it having been uſed time out of mind; or in the ſolemnity of our legal phraſe, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and cuſtoms which compoſe the common law, or *lex non ſcripta* of this Kingdom.

[B.]

Tucker's Blackſtone—vol. 1. p. 66.

As to general cuſtoms, or the common law, properly ſo called. This is that law, by which proceedings and determinations in the Kings ordinary courts of juſtice are guided and directed. This for the moſt part ſettles the courſe in which lands deſcend by inheritance; the manner and form of transferring

and acquiring property; the ſolemnities and obligation of contracts, the rules of expounding wills, deeds and acts of parliament; the reſpective remedies of civil injuries; the ſeveral ſpecies of temporal offences, with the manner and degree of puniſhment; and an infinite number of minuter particulars which diffuſe themſelves as extenſively as the ordinary diſtribution of common juſtice requires. Thus for example, that there ſhall be four ſuperior courts of record; the chancery, the king's bench, the common pleas, and the exchequer—that the eldeſt ſon alone is heir to his anceſtor—that property may be acquired and transferred by writing—that a deed is of no validity unleſs ſealed and delivered—that wills ſhall be conſtrued more favourably and deeds more ſtrictly—that money lent upon bond is recoverable by action of debt—that breaking the public peace is an offence, and puniſhable by fine and impriſonment—all theſe are doctrines that are not ſet down in any written Satute, or Ordinance, but depend merely on immemorial uſage, that is, upon common law, for their ſupport.

[C.]

4th Blackstone—283.

To this head of ſummary proceedings may alſo be referred the method immemorially uſed by the Superior Courts of Juſtice, of puniſhing contempts, by *attachment*, and the ſubſequent proceedings thereon.

The contempts that are thus puniſhed are either *direct*, which openly inſult or reſiſt the powers of the courts, or the perſons of the judges who preſide there; or elſe are *consequential*; which, (without ſuch groſs inſolence or direct oppoſition) plainly tend to create an univerſal diſregard of their authority. The principal inſtances of either ſort that have been uſually puniſhable by attachment are chiefly of the following kinds.

[D.]

4th Blackstone—284—5 & 6.

"6. Thoſe committed by parties to any ſuitor proceeding before the Court, as by diſobedience to any rule or order, made in the progreſs of a cauſe; by non-payment of coſts awarded by the Court upon a motion, or by non-obſervance of awards duly made by arbitrators or umpires, after having entered into a rule for ſubmitting to ſuch determination. Indeed the attachment for moſt of this ſpecies of contempts, and eſpecially for non-payment of coſts and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party; though carried on in the ſhape of a criminal proceſs, for a contempt of the authority of the Court. And therefore it hath been held that ſuch contempts, and the proceſs

thereon, being properly the civil remedy of individuals for a private injury are not releaſed or affected by a general act of pardon. And upon a ſimilar principle, obedience to any rule of Court may alſo by ſtatute 10 George 3. C. 50, be enforced againſt any perſon having privilege of parliament by the proceſs of diſtreſs infinite.

7. Thoſe committed by any other perſons under the degree of a peer; and even by peers themſelves, when enormous and accompanied with violence, ſuch as forcible *rescous*, and the like; or when they import a diſobedience to the King's great prerogative rights of prohibition, *habeas corpus*, and the reſt. Some of theſe contempts may ariſe in the face of the Court; as by rude and contumelious behaviour; by obſtinancy, perverſeneſs, or prevarication; by breach of the peace, or any wilful diſturbance whatever: Others, in the abſence of the party; as by diſobeying, or treating with diſreſpect the King's writ, or the rules or proceſs of the Court; by perverting ſuch writ or proceſs to the purpoſes of private malice, extortion, or injuſtice; by ſpeaking or writing contemptuouſly of the Court or Judges, acting in their judicial capacity; by printing falſe accounts, or even true ones (without proper permiſſion) of cauſes then depending in judgment; and, by any thing in ſhort that demonſtrates a groſs want of that regard and reſpect, which, when once Courts of Juſtice are deprived of, their authority (ſo neceſſary for the good order of the kingdom) is entirely loſt among the people.

The proceſs of attachment for theſe and the like contempts, muſt neceſſarily be as ancient as the laws themſelves. For laws, without a competent authority to ſecure their adminiſtration, from diſobedience and contempt, would be vain and nugatory. A power, therefore, in the ſupreme courts of juſtice to ſuppreſs ſuch contempts, by an immmediate attachment of the offender, reſults from the firſt principles of judicial eſtabliſhments, and muſt be an inſeparable attendant upon every ſuperior tribunal. Accordingly we find it actually exerciſed, as early as the annals of our laws extend.

[E.]

3*d*. *Hawkins—b*. 2. *page* 272.

"And firſt I ſhall conſider the nature of the firſt of theſe, which is generally called an attachment, and is properly grantable in caſes of contempts, againſt which for the moſt part all courts of record generally, but more eſpecially thoſe of Weſtminſter Hall, and above all the Court of King's bench, may proceed in a ſummary manner, according to their diſcretion, and if they happen to be done by a perſon preſent in the Court, and appear, either from the confeſſion of the party, on his exa-

mination upon oath, or by the view or immediate obſervation of the judges themſelves, the Court may immediately record the crime, and commit the offender, and ſhall alſo inflict ſuch farther puniſhment as ſhall ſeem proper, and if ſuch offences be done by a perſon not preſent in Court, and be complained of by affidavit, the Court will either make a rule on the party to attend at a certain day, in order to anſwer the matter of the complaint againſt him; or elſe will make a rule upon him to ſhew cauſe why an attachment ſhould not be granted againſt him, or elſe if the offence were of a very exorbitant nature, as for words of contempt of the Court itſelf, will grant an attachment on the firſt complaint, without any ſuch rule to ſhew cauſe; and the party who is ordered to attend the Court in purſuance of ſuch rule, ought regularly to appear in proper perſon, and not by attorney, as alſo muſt every one againſt whom an attachment is granted; and if the offence be of an henious nature, and the perſon attending the Court upon ſuch a rule to anſwer in or appearing upon an attachment, be apparently guilty, the Court will generally commit him immediately in order to anſwer interrogatories to be exhibited againſt him in relation to ſuch contempt. But if there be any favourable circumſtances to extenuate or excuſe the offence, or if it appear doubtful whether the party were guilty of it or not, the Court will generally in their diſcretion, ſuffer the party, having firſt given notice of his intention, to the proſecutor, to enter into a recognizance to anſwer ſuch interrogatories; and if no ſuch interrogatories be exhibited within four days after ſuch recognizance, will diſcharge the recognizance upon motion; yet if the party do not make ſuch motion, and the interrogatories be exhibited after the four days, the Court will compel him to anſwer them; but in all the caſes above mentioned, if the party fully purge himſelf upon oath, in his anſwer to ſuch interrogatories of the whole matter charged upon him, the Court will diſcharge him of the contempt, and leave the proſecutor to proceed againſt him for the perjury, if he thinks fit; but if the party confeſs part of the contempts in his anſwer to ſuch interrogatories, and deny others, the Court will not diſcharge him from the contempts ſo denied, but will proceed further to examine the truth of them, and will inflict ſuch puniſhment as from the whole ſhall appear reaſonable; neither will the Court diſcharge the party upon a ſhifting or evaſive anſwer to any material part of the charge againſt him but will puniſh in the ſame manner as if he had confeſſed it.

[F.]

Hawkins B. 2. p. 6.

Alſo, it ſeems that even a Court-leet is ſo far entruſted with the keeping of the peace within its own precinct, that

the ſteward of it may, by recognizance, bind any perſon to the peace, who ſhall make any affray in his preſence, ſitting in the Court, or may commit him to the ward, either for want of ſureties, or by way of puniſhment, without demanding any ſureties of him ; in which caſe he may afterwards impoſe a fine, according to his diſcretion ; from whence it follows *a fortiori*, that other ſuperior courts of record have the like power.

[G.]

2d Atkins—page 469.

A motion againſt the printer of the Champion, and the printer of the St. James's Evening Poſt ; that the former, who is already in the Fleet, may be committed cloſe priſoner ; and that the other, who is at large, may be committed to the Fleet, for publiſhing a libel againſt Mr. Hall and Mr. Garden, (executors of John Roach, Eſq. late mayor of the garriſon of Fort St. George, in the Eaſt Indies ; and for reflecting likewiſe upon Gov. Mackray, Gov. Pitt, and others, taxing them with turning affidavit men, &c. in the cauſe now depending in this Court, between Mrs. Roach, and the executors : and, inſiſting that the publiſhing ſuch a paper, is a high contempt of this Court, for which they ought to be committed.

Lord Chancellor. Nothing is more incumbent upon courts of juſtice, than to preſerve their proceedings from being miſrepreſented ; nor is there any thing of a more pernicious conſequence, than to prejudice the minds of the public, againſt perſons concerned as parties in cauſes, before the cauſe is finally heard.

It has always been my opinion, as well as the opinion of thoſe who have ſat here before me, that ſuch a proceeding ought to be diſcountenanced.

But, to be ſure, Mr. Solicitor General has put it upon the right footing, that notwithſtanding this ſhould be a libel, yet unleſs it is a contempt of the Court, I have no cognizance of it : For whether it is a libel againſt the public or private perſons, the only method is to proceed at law.

The defendant's counſel have endeavored two things : 1ſt. To ſhew that this paper does not contain defamatory matter. 2d. If it does, yet there is no abuſe upon the proceedings of this Court, and therefore there is no room for me to interpoſe.

Now, take the whole together, though the letter is artfully penned, there can remain no doubt, in every common reader at a coffee-houſe, but that this is a defamatory libel.

For, after he has laid down the plan of the paper in this manner: "It has been obſerved long ago, that the Roman catholics are very zealous for the propagation of their religion, and that they ſtick at nothing, though ever ſo ſcandalous to compaſs their ends; we have had lately a moſt ſhocking inſtance of it."

Then it goes on, and treats of perſons, ſome at Paris, and others at London; and, it is very plain, that it is relative to the executors of Major Roach, parties in this cauſe, notwithſtanding there are only initial letters of their names and places of abode, in the manner following: "He has appointed, (meaning Major Roach) T—H—l of G—o—d, S—t, and F—G—n of the T—e, his E—rs." All the libellers of the kingdom know now, that printing initial letters will not ſerve their turn, for that objection has been long got over.

The bill in chancery, mentioned in the laſt paragraph of the firſt column, can be applicable only to this cauſe; for the words are—"She, (meaning Mrs. Roach) came back to London, and filed a bill in chancery, againſt the two E—rs, in order to call them to an account."

It is plain therefore who is meant; and as a jury, if this fact was before them could make no doubt, ſo, as I am a judge of facts, as well as law, I can make none.

I might mention ſeveral ſtrong caſes, where even feigned names have been conſtrued a libel upon thoſe perſons who were really meant to be libelled.

I ſhall take notice but of one, and that is the caſe of Mrs. Dodd, who printed a letter abuſing the late King under the name of Merriwies Sophy of Perſia; it was tried before a jury of gentlemen of great honor, who were ſo well ſatisfied of the real meaning, that, notwithſtanding the whole was concealed under fictitious names, they found the publiſher guilty.

Next, as to the expreſſion in the paper, that "there were, even here in England, ſome gentlemen of note and character, who did not ſcruple to turn affidavit men." Mr. Solicitor General has inſiſted, this may be taken in a good ſenſe, as well as a bad one, becauſe a man who ſwears true, is as much an affidavit man, as if he ſwears falſe, and the Court ſhould take it *in mitiori ſenſu*. I will not take upon me to ſay, whether upon an action at law, this could be ſuppoſed as libellous upon the ſtrict rules.

But, I believe, there is no body who is converſant in the proceedings of this Court, but muſt know, that this ex-

preſſion means perſons who are ready, upon all occaſions, to make affidavits, without regarding whether they have any conuſance of the facts.

Upon the whole, as to the libellous part, if ſo far there ſhould remain any doubt, whether the executors are meant; it is clear, beyond all contradiction, upon the laſt paragraph, in which are theſe words, "This caſe ought to be a warning to all fathers, to take care with whom they truſt their children, and their fortunes, leſt their own characters, their widows, and their children, be aſperſed, and their fortunes ſquandered away in law ſuits."

And likewiſe, though not in ſo ſtrong a degree, the words "turned affidavit men," is a libel againſt thoſe gentlemen who have made them.

It is inſiſted, that the following words, "This cauſe, which has been long depending in chancery here, was at laſt determined on Wedneſday the third inſtant, by the Right Honourable the Lord High Chancellor. A great many perſons, who, as well as I, were concerned for Mrs. Roach and, impatient to know the iſſue of that affair, went that day to Lincolns-Inn Hall, and we were every one of us extremely pleaſed when we heard that moſt upright magiſtrate's decree, by which the maſter's report was confirmed, and the Right Honourable the Lord Barrimore appointed guardian" are not a contempt of this Court, becauſe here is no miſrepreſentation of facts, and the Court ſpoken of with the greateſt reſpect.

And indeed, it is very true, but then this is colourable only, and ſuch colours ſhall never impoſe upon the Court.

There are three different ſorts of contempt. One kind of contempt is ſcandalizing the Court itſelf.

There may be likewiſe a contempt of this Court, in abuſing parties who are concerned in cauſes here.

There may be alſo a contempt of this Court, in prejudicing mankind againſt perſons, before the cauſe is heard.

There cannot be any thing of greater conſequence, than to keep the ſtreams of juſtice clear and pure, that parties may proceed with ſafety both to themſelves and their characters.

The caſe of Rakes, the Printer of the Glouceſter Journal, who publiſhed a libel, in one of the Journals, againſt the commiſſioners of charitable uſes at Burford, calling his advertiſe-

ment a hue and cry, after a commiſſioner of charitable uſes, was of the ſame kind as this, and the Court in that caſe committed him.

There are ſeveral other caſes of this kind; one ſtrong inſtance, where there was nothing reflecting upon the Court, in the caſe of Captain Perry, who printed his brief before the cauſe came on; the offence did not conſiſt in the printing, for any man may give a printed brief, as well as a written one to counſel? but the contempt of this Court, was prejudicing the the world with regard to the merits of the cauſe before it was heard.

Upon the whole, there is no doubt, but this is a contempt of the Court.

With regard to Mrs. Read, the publiſher of the St. James's Evening Poſt, by way of alleviation, it is ſaid, that ſhe did not know the nature of the paper; and that printing of papers and pamphlets is a trade, and what ſhe gets her livelihood by.

But though it is true, this is a trade, yet they muſt take care to do it with prudence and caution; for if they print any that is libellous, it is no excuſe to ſay, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous, and ſo is the rule at law in theſe caſes.

Therefore Mrs. Read muſt be committed to the Fleet, according to the common order of the Court upon contempts.

But as to Mr. Huggonſon, who is already a priſoner in the Fleet, I do not think this any motive for compaſſion, becauſe theſe perſons generally take the advantage of their being priſoners, to print any libellous or defamatory matter which is brought to them, without ſcruple or heſitation.

If theſe printers had diſcloſed the name of the perſon who brought this paper to them, there might have been ſomething ſaid in mitigation of their offence; but as they think proper to conceal it, I muſt order Mrs. Read to be committed to the Fleet, and Huggonſon to be taken into cloſe cuſtody of the warden of the Fleet.

[H.]

2d Verſey—520.

Mrs. Farley being committed to the Fleet, upon motion of the plaintiff, for having publiſhed an advertiſement in the Briſtol Journal, relating to the anſwer in chancery put in by the defendant, Sir Robert Cann, now moved to be diſcharged, hav-

ing paid costs of the contempt and submitted; as also the defendant did, confessing the advertisement was put in at his instance; and it was not opposed by the plaintiff, who left it to the Court.

Lord Chancellor said, his reason for committing, was not only for the sake of the party injured by such advertisement, but for the sake of the public proceedings in this Court, to hinder such advertisements, which tend to prepossess people as to the proceedings in the Court. But, as on a prosecution for a libel in B. R. for publishing such a scandalous advertisement, if they confess in what manner it was brought to them, and every thing about it, that Court takes that into consideration to alleviate the punishment; so here, though here ignorance of the law is no justification for publishing the advertisement, yet having discovered in what manner it was brought to her with other advertisements, and disclosed every thing, it is a ground to alleviate the punishment, therefore he granted the motion.

[L]

Hardwicke's cases—237.

The defendant, *Phillips*, was formerly married to one *Mr. Muilman*, a merchant in London, but she being found to have a former husband alive at that time, that marriage with *Muilman* was afterwards declared to be null, by sentence of the spiritual Court, and *Muilman* has since married another wife, but now she, the defendant, has instituted a suit in the ecclesiastical Court, to repeal that sentence of nullity, pretending the man to whom she was married, at the time of marrying *Muilman*, had himself at that time another wife alive, and therefore her marriage with him was void, and consequently the marriage to *Muilman* was valid, and this suit is now before the delegates.

The present plaintiff brought an action against the defendant upon a promissory note signed by her, to which she pleaded that she was married to *Muilman*; plaintiff replied that the marriage to *Muilman* was void, because of the prior marriage, and she rejoined that it was good, because the prior marriage was void, and so they were at issue, and the cause stood for trial; when *Muilman* applied to the Court, and represented this to be a fictitious action, by connivance between plaintiff and defendant, to burthen him with actions, and to impose upon the Court—and

Strange, who moved for *Muilman*, cited a case of *Cutler*, vs. *Goodwin*, Mich. 8. G. I. (see 1st Strange—420) which was a writ of error in this Court, upon a judgment in the Common Pleas, and the very morning when it stood for a second ar-

gument, the parties told the attornies they had agreed; but the attornies wanting to know the Courts' opinion of the caſe, let the argument go on—and judgment was given; but the Court afterwards ſet aſide the judgment for that very reaſon, becauſe the parties had agreed. The ſtatute of *Weſtminſter* 1, c. 29, was likewiſe cited, which provides that if any ſerjeant, pleader, or other, do any manner of deceit, or colluſion, in the King's Court, or conſent unto it, in deceit of the Court, or to beguile the Court, or the party, they ſhall be impriſoned for a year and a day, &c. And cited 2 *Inſt.* 215, where Lord Coke, in his expoſition of this *ſtat.* of a fictitious ſuit, which was within this *ſtat.* and *Comberb.* 425, where *Holt* ſays, if he had not thought the feigned iſſue had been directed out of chancery, he would not have tried it, and ſays he, do you bring ſob actions to learn the opinion of the Court?

On the other ſide, it was ſaid, that as to the caſe in Comberbach 425, of *Brewster*, vs. *Kitchen*, it appears to have had another argument, and judgment given at p. 466, notwithſtanding what was ſaid by Holt; and that *Corbet's* caſe, in *Coke's* reports, was but a fictitious action.

Lord Hardwicke. Here are two queſtions—1ſt. Whether Mr. *Muilman* is a proper perſon to make this complaint, and I think, that as this is a contempt of the Court, and may be of prejudice to Mr. *Muilman*, ac may, for the Court don't always expect that complaint of a contempt ſhould be made to them by a party, for where there is a colluſion between all the parties, a ſtranger may lay it before the Court, as *amicus curiæ*; and beſides in this caſe, Mr. *Muilman* is particularly concerned to do it, for the verdict, if it had paſſed againſt him, could not have been given in evidence againſt him, not being party to the ſuit, yet 'tis a prejudice to a man, to have the fame of a verdict, that he is married in this way. The *ſecond* queſtion is, whether here be ſufficient grounds of complaint. Now, this is a mere fictitious action, not to determine a right or controverſy, but to deceive the Court, and raiſe an evil fame of *Muilman*; and ſurely that can't be ſaid to be no offence. That ſuch practices are not lawful, is plain from that old ſtatute of *Edward* 1. and I can't ſee how there can be a ſtronger inſtance than the preſent; and, 'tis incumbent on Courts of Juſtice, to keep the ſtreams of juſtice clear, or they will be made uſe of as means of ſcandal.

As to the inſtance of *Corbet's* caſe, and that of *Brewster* vs. *Kitchen*, as to the latter, the Court did expreſs great reſentment, but in thoſe caſes it don't appear any complaint of contempt was made, and the Court don't uſe to take up ſuch matters *ex officio*. As to the cauſes by conſent in chancery, they

are to determine real controverſies, and between adverſaries, as to the right, though amicable in applying for deciſion.

Upon the whole matter, the Court thought this a contempt, even though the action were upon a real demand, becauſe it had been made an ill uſe of; and therefore ordered, that the plaintiff and defendant and one *Hudson*, who was the acting attorney for both, ſhould ſtand committed, to anſwer upon interrogatories; and that the proceedings in the action be ſtaid, and for the honor of the Court vacated, but that was ſuſpended till the examination was over.

N. B. In about five days afterwards, they were brought up and bailed to anſwer interrogatories, but were obliged to give notice of the bail.

All this was in *Mich.* term laſt, and now this term the maſter of the crown office, made a ſpecial report of the examination; and the Court unanimouſly agreed that they had not cleared themſelves of the contempt, and that this was a fictitious action; and again affirmed, that the reality of the debt does not make a material difference, if the action is brought in deceit of the Court, for then the debt, though due, will be taken to be but a pretence, and the abuſe of the Court the ſame.

One of the interrogatories propoſed to the attorney was, what authority he had to make uſe of the attorney's name he had uſed. To which interrogatory he demurred anſwering, becauſe it might ſubject him to the penalty of the late act; and the Court allowed, that a man may demur to an improper interrogatory. But *Strange* ſaid, that in ſuch caſe the method is to move to have that interrogatory ſuppreſſed. And *Matthews* of the crown-office, tells me that is the method and practice when the Court is ſitting; but this examination was in the vacation.

The Court ordered, they ſhould all ſtand committed.

[J.]

Hardwicke's cases—107. *another edit.* 167.

Stock *verſus* Huggins *and* De Smith.

MARSH. To ſhew cauſe why an attachment ſhould not iſſue againſt the defendants for diſobeying an award which is made a rule of this Court; he ſays they have liberty by the ſtatute 9 & 10 and 10 W. 3 C. 15 which inſtitutes this ſummary way of enforcing awards to complain of any undue practice in making the award, any time within the next term after it is made; and in this caſe one of the arbitrators was not ſummoned, nor the defendant *Smith*, one of the parties.

PARKER with him. "That where an award appears to be unreaſonable, tho' an action of debt may lie upon it, yet the Court will not grant an attachment, as was determined in the caſe of *Wilmot and Allen, Paſc. 4. Geo. 2.*"

KETTLEBY. "As to the action of debt which is brought he ſays 'tis as reaſonable to grant an attachment. [He cites ſeveral authorities, among others] "He cites Richardſon and Chancey, *Mich.* 1730 where plaintiff had judgment in an action of debt upon an award, and the regularity of the judgment being under reference to the maſter, an attachment was applied for and granted, notwithſtanding this objection; however when the judgment was reported regular they ſtopped the attachment."

LORD HARWICKE. "I am ſatisfied you ought not to have an attachment while an action is pending."—"In this caſe there are two remedies, one by action to which you are entitled by courſe of law, but the other depends upon the diſcretion of the Court; and both are for the very ſame purpoſe, viz. for the money awarded, for the Court will not deliver the party from an attachment 'till he has paid the money. And the caſes cited are agreeable to this doctrine; for in *Richardson* and *Chancey*, during the ſtay of his judgment he had loſt the fruit of his action. So in the caſe in *Salk.* 73. No action was depending when the attachment was granted; though in that caſe I ſhould have thought it conſiderable, whether when he had got bail to his action, the Court ſhould not have ſtopped the attachment, but however the attachment there was granted before any action brought. *The rule must be diſcharged.*

[K.]

2d Burrows—792.

Mr. Attorney General had moved, (on Monday, the 29th of January laſt) for an attachment againſt Arthur Beardmore, the under-ſheriff, for a contempt of the Court, in taking upon himſelf, without any pretence of authority, to remit a part of the ſentence pronounced upon John Shebbeare, in Michaelmas term laſt: One part of this ſentence was—"That the defendant, John Shebbeare, be ſet in and upon the pillory." And ſeveral affidavits were then produced by Mr. Attorney General, which were very full in aſſerting—"that the defendant only ſtood upon the platform of the pillory, unconfined, and at his eaſe, attended by a ſervant in livery, (which ſervant and livery were hired for this occaſion only) holding an umbrella over his head all the time: But his head, hands, neck and arms, were not at all confined, or put into the holes of the pillory; only that he ſometimes put his hands upon the holes of the

pillory, in order to reſt himſelf." And it was proved that Mr. Beardmore attended as under-ſheriff, with his wand; and that he treated the criminal with great complaiſance, in taking him to and from the pillory.

A rule was thereupon made to ſhew cauſe why an attachment ſhould not iſſue againſt Mr. Beardmore, the under-ſheriff.

On Thurſday 8th February 1759, Mr. Morton, Mr. Serj. Davy and Mr. Howard ſhewed cauſe.

Mr. Beardmore's affidavits ſhewed, that his officiating at all in this affair, was quite caſual and unexpected, on a ſudden meſſage from his brother under-ſheriff. It was full and explicit as poſſible, "that he had no ſort of deſign or intention, either directly or indirectly to favor Shebbeare, that he gave no particular direction to his under-officers about it, but meant and intended that this ſentence ſhould be executed in the uſual and ordinary manner, as other ſentences of the like kind were and uſed to be executed, and that he ſtood at a ſhop oppoſite to the pillory, during the whole time, without almoſt ever taking his eyes off from it during the whole time, in order to ſee the ſentence properly executed: and that he would have obliged him to ſtand in what he (Mr. Beardmore) took to be the proper manner, if Shebbeare had offered to withdraw himſelf from ſuch poſition." And he poſitively ſwore that according to the beſt information he could get, he looked upon the manner in which Shebbeare ſtood, to be the uſual and proper place of ſtanding, purſuant to rules worded as this rule is; And that he did according to the beſt of his judgment, fully and duly execute the judgment of the Court in the uſual and common manner.

And he produced 14 or 15 affidavits, proving that the manner in which Shebbeare actually ſtood, was with his hands in and through the ſmall holes, and his head and face fully expoſed through (ſome of them ſaid in and through) the large hole: And that he ſtood ſo, during the whole time that the rule required him to ſtand.

And ſeveral of the deponents (ſheriff's officers and others) ſwore poſitively, that the ſtanding without confining the head, was the uſual and ordinary manner, and had been ſo for 30 or 40 years, in Middleſex, of criminals ſtanding purſuant to rules of this kind; and that it had been uſual in the country, not to faſten or confine the head in the pillory, for a great many years backwards, and ever ſince one or two perſons who were locked down in the pillory had been killed; and ſeveral of them particularized how much inconvenience might follow from faſten-

ing it down upon the head. And two of the ſheriff's officers ſwore "that they always deemed and conceived it to be a full execution of the words of the rule, to ſtand as this man ſtood, with the hands in, and the head and face expoſed thro' the holes of the pillory."

But Mr. Beardmore and his counſel admitted (or at leaſt did not pretend to contradict) that his arms were not put thro' the ſmall holes, and that the pillory was not ſhut down upon Shebbeare, nor his head abſolutely THRUST THROUGH it: Which the ſheriff's officers ſwore they did not apprehend to be neceſſary or uſual, unleſs the perſon was refractory. Neither indeed was it pretended, that the upper board of the pillory was at all let down over his neck.

Mr. HOWARD obſerved (amongſt other things) that the ſentence of quartering and burning the bowels of traitors, is never ſtrictly executed, nor the puniſhment of burning in the hand, which is conſtantly and notoriouſly done in the face and with the knowledge of the Judges themſelves, with a cold iron.

LORD MANSFIELD. If the charge be true, it is admitted that ſuch a diſobedience to the rule of the Court, by their own officer, is puniſhable in this ſummary way.

The fact charged is "That by the permiſſion and under the inſpection of the under-ſheriff, the criminal *ſtood upright* and erect upon the platform of the pillory; and that his head, neck, arms or hands were not put through the holes of the pillory; nor his head even inclined to it." As to the defence which Mr. Beardmore has ſet up, it would have been more judicious to have no defence at all, than ſuch a one as this. The attempt to juſtify, upon oath, the offenders ſtanding upright, as a legal execution of the ſentence, is an aggravation: It is contrary to every man's conviction; and the form of a pillory alone demonſtrates what is meant by being ſet in, as well as upon it. The offender was no more in the pillory, than the footman who ſtood by him.

Then as to the other part of the defence, the uſage—There is not a ſingle inſtance particularized or ſhewn of this kind; or to prove that there has been ſuch a uſage.

None of his affidavits ſwear, that the method now taken was the uſual and ordinary method, though two of them ſay they conceive it to be a full execution of the rule. They only ſay "that it was not uſual or cuſtomary for many years backward, in Middleſex, to faſten or confine the neck in the pillory." And they give the reaſon of it too, and mention ſome

inconveniences of that method. One of them says that this man stood as he had usually seen others do: but he specifies no instances. Revie, one of the persons who makes affidavit says, he has known this practice about setting in the pillory forty years, having lived so long near Charing-Cross: and he never saw a criminal so publicly exposed in and upon the pillory before as this man was. To be sure, the face of the man who stands upright, is more exposed to view, than it would be if his head were bent down and put in the pillory. And therefore, though the words of the affidavit are artfully drawn, to convey another meaning, the mental reservation of the swearer guards him from perjury, supposing the fact to be, that he never saw a man stand upon the pillory before, in the manner that Shebbeare did.

So many affidavits, so studiously and artfully penned, to be falsely sworn in the one sense and read in another, are an aggravation, and therefore, the rule ought, in my opinion, to be made absolute.

Mr. *Just.* DENISON, concurred. Nothing imports us more, than to see that the judgments of the Court be duly executed. Now no ministerial officer, or any one that has seen a pillory, can doubt the meaning of setting a criminal in the pillory. The very form of a pillory shews what it must mean. And it cannot be pretended that standing erect upon the pillory, is being set in it. If there had been such usage in Middlesex, it was high time to put a stop to it. But here is no such usage proved. Therefore, the under sheriff ought to answer upon interrogatories.

Mr. *Just.* FOSTER, concurred: And he considered this affair, as highly concerning the honour and dignity of the Court, and the effectual execution of justice. Mr. Beardmore cannot think, nor will he venture to say, upon his examination on interrogatories, "that this is the usual method of putting offenders in the pillory."

Mr. *Just.* WILMOT also concurred, that this inquiry was a matter of the highest importance to the honour of the Court, and the due execution of the sentence on offenders; and that the offence is of the most pernicious tendency; nothing being of worse consequence, than that an officer of the Court should combine with a criminal to frustrate the sentence of the court. He mentions a passage that recurred to him upon this occasion, which he remembered, to have met with in the Year-books, and which is quoted in the Mayor of Oxford's case in Palmer 454: Where the reason given in the record, for the plaintiff's recovering a large sum in a special action against

the defendant for beating him, being his adversay's attorney, was "*Quia* the defendant, *quantum in se fuit, non permisit regem regnare.*" And it may be, with at least as much propriety, said of this under sheriff in the present instance, "that *quantum in se fuit, non permisit regem regnare.*" And he expressly declared "that in order to execute the true intent and meaning of this rule, the head and hands ought to be put in and through the pillory, and remain so during the whole time." Mr. Beardmore does not swear that he ever saw a sentence executed in this manner: nor do his affidavits specify any instance of it. He inquired into the manner of executing the sentence, only in order to elude it: no man could doubt how it ought to be executed. I think his defence makes his case worse, rather than mends it. Therefore, he was clearly of opinion with his lordship and the rest of his brethren, "that the attachment should issue against Mr. Beardmore."

The whole Court commended Mr. Attorney-General, for bringing this complaint before them; as the honour and dignity of the Court, and the end and very essence of justice were so materially concerned in the due and regular execution of their sentences.

Per cur. unanimously, Rule for the attachment made absolute.

On the Monday following, (viz. 12th February, 1759) the defendant appeared, and gave bail to answer interrogatories; and was swore to make true answer thereto.

N. B. He had given notice "that he would come in and confess the contempt, and submit directly to the judgment of the Court." But this notice was withdrawn; his counsel being satisfied that this could not be done within the course of the Court, especially as this was not a mere single fact, but a complicated charge, arising from several circumstances.

Lord MANSFIELD said, they were certainly right in withdrawing their intended motion.

And, Mr. Morton, of counsel for the defendant, said that this same thing was formally attempted in Dr. Colebatche's case: (who would immediately have come in and submitted to the judgment of the court) but he was obliged to be examined upon interrogatories.

The defendant accordingly gave bail, (himself in £. 200 and each of his two sureties in £. 100) to appear and an-

swer to interrogatories; and then was sworn to make true answer to such interrogatories as should be exhibited against him. And after having been examined, the interrogatories and examination was refered to me, as usual: And I made my report. The examination was much to the same effect as his defence upon the affidavit. And the rule was as follows:

Saturday next, after the morrow of the Ascension, &c. 32 G. 2. (26th May, 1755) Upon hearing the report of James Burrow, esq. coroner and attorney of this Court, it is adjudged by this Court, "That the defendant is in contempt:" It is thereupon ordered, "That he be committed to the custody of the marshal of the Marshalsea of this Court." But by consent of his Majesty's Attorney-General, it is ordered, that the said defendant be continued upon his recognizance; and that the said defendant do personally appear in this Court, on the second day of next term, to receive the judgment of this Court. It is thereupon further ordered, that he the said defendant be now discharged out of the custody of the said marshal.

The defendant now personally appearing in Court, pursuant to the last rule.

Mr. *Just.* DENISON pronounced the sentence. He first expatiated upon the offence. In doing which, he declared, that it was at the sheriff's peril, to execute the rule of the Court in a proper manner, and that no one possibly could doubt, that suffering a gross offender, an infamous libeller of the king and government, to stand in triumph, erect upon the pillory, with a servant holding an umbrella over his head, instead of standing with his head in the pillory, by way of disgrace and ludibrium, (which is the intent of this kind of punishment) was a highly improper and insufficient manner of executing this rule of the court. After which, he gave the sentence upon the defendant, Beardmore, for this his contempt, viz.

To pay a fine of £. 50 and to be committed to the custody of the marshal, for two months, and till the fine shall be paid.

[L.]

2d Blackstone's Reports, page 1110.

KING *vs.* HALL.

The Court had granted an attachment against him last Hilary term, for a contempt in causing one Cameron (who

had brought an action against Leycroft which was referred at nisi prius, and the order made a rule of court) to be arrested at his suit, while he was attending the arbitrators, on purpose (as it was sworn) to prevent him from being heard by the arbitrators, and thereby to obstruct justice. He was arrested on this attachment, and examined on the 24th of June, by the secondary for seven hours, but not having time to complete his examination, he on the 25th gave notice of bail, for the 26th, being the last day of Trinity term. Davy objected, that this was not sufficient notice, not being two days, according to the rule of Court. But the court held, that the rule did not extend to criminal cases, but it was discretionary. Reasonable notice is sufficient, and these bail live in Holburn. Nor, in criminal cases, is any justification requisite. So they entered into recognizance of £. 20 each, and bailed the defendant.

[M.]

3d Burrows—B. R. page 1256.

The defendant came up, to receive the judgment of the Court, having been reported in contempt. The contempt was this—The defendant Wheeler, being a vintner, had bought two pipes of wine of one James Stuart Tulk: which wine the defendant asserted to be adulterated and bad, and therefore refused to pay for it. Whereupon Tulk brought his action against him for the price. At the trial, the matter was, by consent of both parties (probably, to conceal the secrets of the trade, and the nature and degree of mixing) referred to the arbitration of one Mr. Charles Corderoy: Wheeler consented to abide by his award, and not to bring any bill in equity. The rule of nisi prius was made a rule of this Court. Corderoy awarded, "That Wheeler should pay Tulk a certain sum of money, (about £. 20) for his wine." Wheeler refused to pay the money awarded; and moved this Court, "to set aside the award."

Upon hearing that motion, the Court thought there was no ground to set aside the award; but that it ought to be performed. Upon which the defendant performed the award, and paid the money. Afterward he was so ill advised as to bring a long bill in the Court of chancery. The plaintiff here, (defendant in equity) moved this Court for a rule to shew cause why an attachment should not issue against him, for bringing a bill in equity, contrary to the rule of this Court made by consent. Upon the motion, the Court expressed their resentment, and made a rule to shew cause. The vacation then coming on, the defendant filed a supplemental bill in chancery, stating a motion for an attachment,

and praying an injunction and relief. The plaintiff (defendant in equity) pleaded, in bar, the rule of this Court: Which plea was allowed.

Upon shewing cause here, against the attachment, the Court, from abundant indulgence, heard, a second time, every thing which could be said to impeach the award. But they continued of their former opinion, in support of the award: And the rule for the attachment was made absolute of course.

He was taken up upon the attachment: And interrogatories filed. He was examined: And the interrogatories and examination was referred to me. I reported him in contempt: For he explicitly owned the fact of bringing an original and supplemental bill in chancery; though he pretended that he did not understand that he had ever consented "not to bring a bill in equity," nor ever meant any such consent.

Afterwards, upon his being driven to the brink of commitment, he was forced to submit: And it was referred to me to require "James Stuart Tulk, Charles Corderoy and James Jefferson, in the Court of chancery, to be dismissed;" and also to liquidate and ascertain the amount of the costs out of purse of the said James Stuart Tulk, Charles Corderoy and James Jefferson, occasioned by his having filed a bill and proceeded in chancery against them, in contempt of the order of this Court. And the Court adjourned the consideration of the judgment for his contempt, until after I should have made my report.

Immediately after the making this rule, the defendant dismissed his bill in chancery; and readily attended and submitted to the taxation of all the costs which the three persons mentioned in the rule had been put to, out of pocket, as well in Court of chancery as in this Court, arising from his contempt: All which costs (which were amply allowed, pursuant to the intimation from the Court, "that they ought to be so," and amounted to £. 87 4s) he immediately paid: And perhaps his own might be as much more, at least.

All which was now laid before the Court: And nothing remained, according to the ordinary course of proceeding, but for the Court to have passed judgment upon him for his contempt. The Court was unwilling to punish him further, by fine and imprisonment; as he had smarted severely: And yet, as his contempt was so obstinate, they did not care that a slight sentence should stand upon their records. Therefore they waved giving judgment, by consent. They said,

they would not receive more complaints now, upon this occasion: But that the attorney and counsel were equally guilty of the contempt, and more criminal; and if it ever happened again they would proceed against them.

[N.]

Mosley's Reports, page 251.

LORD CHANCELLOR. All who were parties, and privies to this wedding, are guilty of a contempt of this court, though they were strangers to the decretal order; but I shall not set up a general inquisition to find out who they are, but some are probably affected by the affidavits, as Mr. Chremer, his wife, and daughter, for when they dined with Mr. Freeman a fortnight before the marriage, Miss Chremer and Miss Long lay together, the day they were married they went into the garden together, and were seen going out of the back door, and the servant who pursued them, found them altogether at Mr. Chremer's house after the wedding: Be it ordered therefore, that it be referred to a master, to see what settlement Mr. Cæsar can make, and at the same time when the master makes his report, let Mr. Chremer, wife, and daughter shew cause when they should not be committed; but I shall make no order for the commitment of Mr. Cæsar, since his uncle, Mr. Freeman, is willing to discharge his person, nor I shall not examine the person, who was the minister that performed the ceremony: And as no objections have been made to the circumstances of Mr. Cæsar, but the lady has provided for herself as well as a guardian could, the Court will consider that in the punishment of Mr. Chremer and the others.

[O.]

8th Modern, page 133.

THE KING *against* WIATT.

Upon a motion for an attachment against the defendant, for publishing a libel against a Doctor of Divinity, in the university of Cambridge, a rule was made upon him to shew cause on such a day why it should not be granted.

He now moved by his counsel to discharge that rule, upon an affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from Crownfield, a printer in Cambridge; that it was in Latin, which the defendant did not understand, and that he did not know who was the author, otherwise than by a letter which he received from the printer, and which was now annexed to his affidavit, by which letter it appeared, that one Dr. Middleton was the author: so that

having shewn how he came by this libel, and having told all he knew of the author, for that reason it was insisted in his behalf, that the rule should be discharged, and that the printer should be prosecuted. But the rule continued on the defendant until he made out his allegations against the printer, who was therefore joined in the rule, that both of them might be before the Court.

In the next term, Dr. Middleton appeared, and confessed in Court that he was the author of the book, And thereupon, the rule was discharged against the defendant and the printer; and the doctor was committed until further consideration of the matter. And within a few days afterwards he was brought into Court, and fined fifty pounds, and bound to his good behaviour for a year.

And so was Dr. Colbatch, the same term, for the like offence.

[P.]

8th Modern, page 81.

THE KING *against* ACKWORTH *and* OTHERS.

Upon a motion for an attachment against the defendants, upon an affidavit of their withdrawing a witness from giving evidence at the assizes, in a trial had there upon an information against certain smugglers; it was shewed for cause why an attachment should not go, that the defendants had affidavits to disprove the charge made against them by the affidavits of the plaintiff; thereupon those affidavits were now read in Court: and it was affirmed to be the constant practice, that though the affidavits produced by the plaintiff were very full as to the charge, yet if the person denied such charge by as plain and positive affidavits, in such case he should be discharged, and an attachment should not go; and that if such affidavits were not true, then the plaintiff had a proper remedy, which was by indicting them for perjury. And because a man shall not be in custody, and deprived of his liberty, by an attachment, therefore this is the only case where a negative oath shall be preferred to an affirmative.

All which was agreed by the Court, but that the present case differed; for the defendant did not by his affidavit plainly deny the fact with which he was charged.

[Q.]

4th Burrows, page 2129.

REX *versus* THOMAS ELKINS.

This man had been returned, by the sheriff of Wilts, "guilty of rescue;" (upon an arrest of mesne process) and an

attachment of the Court had issued against him, upon that return. He was taken thereupon, and had been confined seven weeks in the county goal of Wilts; and was afterwards bailed, to appear in this Court: Which he now did.

Upon Friday, the first day of this term, Sir Fletcher Norton, on his behalf, proposed that the Court should immediately proceed to punish him, without going through the ordinary course of his being examined upon interrogatories, as no denial by himself, upon such examination, could excuse him, after having been returned "guilty of a rescue" by the sheriff.

The Court were of this opinion. They said, it would be giving an opportunity to traverse the return; which in case of a rescue returned, could not be allowed. And accordingly, they ordered him to be brought up again on this day.

And being now brought up, Sir Fletcher Norton cited an anonymous case, in 2 *Salk.* 586, where Sir Samuel Astry, said, "it was the constant course, upon the return of a rescue, to set four nobles fine, upon each offender;" and "he had it from Mr. Justice Twysden."

Lord MANSFIELD. That seems to be a strange rule: It puts all rescues, in all cases and under all circumstances, on the same foot.

The Court seemed inclined to have gone further in the present case: But as the man had already been seven weeks in prison; they only fined him £. 5.

[R.]

Peere Williams, page 675.

POOL *versus* SACHEVERAL.

In a bill brought touching the real and personal estate of Sacheveral, deceased, who had issue, a daughter, by his first wife, married to the plaintiff, Pool, the question was, Whether the defendant, who before had been Mr. Sacheveral's maid servant, was married to him?

She admitted by the answer that she had a bastard by him, which was yet living, but before the second child was born she pretended she was married to the said Sacheveral: and that they had been married in the prison of the Fleet, he by the name of Robert Marshall, and she by the name of Anne How Spinster, and that the marriage was on the 27th November, 1705.

In the spiritual court it was adjudged to be a good marriage, and that the sentence affirmed by the delegates; but the daughter claiming title to the moiety of the real estate, a trial at bar was directed in C. B. where the marriage was found; and afterwards the plaintiff's father put an advertisement into the Daily Courant, intimating, that whereas there was an entry in the register in the Fleet prison, of a marriage there the 27th of November, 1705, in the words and figures following, (viz.) "November 27, 1705. Robert Marshall of St. Martin's Lane in St. Martin's Parish, and Anne How Spinster:" Whoever shall discover and legally prove that the said two persons were then married, and before and at the time of the marriage were really called and known by those respective names, shall have a reward for such discovery (on legal proof of the same) of £. 100 over and above all legal charges, to be paid by Edward Pool.

And it was now moved that Pool should be committed; it having been formerly mentioned before the master of the rolls, who ordered it to be moved before the Lord Chancellor, as being a matter of great moment, concerning on one side, the liberty of the subject, and on the other, the preservation of evidence from subornation and corruption.

The motion being made before Lord Chancellor, it was by him adjourned to the next seal, after which at another day the Lord Chancellor, with great solemnity, thus pronounced his opinion.

This tends to the suborning of witnesses, is very dangerous, and not only greatly criminal, but is a contempt of the Court, being a means of preventing justice in a cause now depending, which is aggravated by the marriage having been pronounced good in the court of delegates, and also a verdict at the bar of the common pleas in its favour; and as the Court may, so in justice it ought, to punish this proceeding.

It has been objected, that nothing has been done in consequence of this advertisement, no witness came in.

Resp. It does not appear but that some person would come in, were this not discouraged; however, the person moved against has done his part, and if not successful, is still not the less criminal.

Object. This is not an offer to any particular person.

Resp. It is equally criminal when the offer is to any, for to any is to every particular person. This advertisement will

come to all persons, to rogues as well as honest men; and it is a strange way of arguing to say, that offering a reward to one witness is criminal, but that offering it to more than one is not so: Surely it is more criminal, as it may corrupt more.

Object. A person coming in for such a reward is no witness, for that his testimony must be rejected.

Resp. It is so of every witness suborned or bribed; he is no witness, if you proved him bribed.

Object. This matter is now over, (viz.) the sentence in the spiritual court and the trial.

Resp. It is not over; for suppose, on the reward offered by this advertisement, a dozen affidavits should come in, proving what it desired may be proved, this would probably induce the Court to grant a new trial, and might overturn all the proceedings which have hitherto passed. It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print to procure evidence, and is tantamount to saying, that such persons as will come in and swear, or procure others to swear such a thing, shall have £. 100 reward; and this in a cause now depending here: If £. 100 is to be allowed, the same reason will hold as to the allowing of £. 500 or £. 1000. And though the intention of the person so advertising may be innocent, (and I, knowing the man, believe it was so, insomuch that if a court may be said to have inclinations or impressions from thence, I must own, I should be influenced by my knowing Mr. Pool to be an honest man:) Yet the justice of the court, nay the justice of the nation being concerned in so public a case, I cannot dismiss the party, though his counsel offer to pay costs to the other side, but in justice, and for example's sake, he must stand committed.

[S.]

Tucker's Blackstone—Note E. *Extract from pages* 378, 9, 80.

"Some late incidents have given rise to an opinion that the common law of England, is not only the law of the American States respectively, according to the mode in which they may severally have adopted it, but that it is likewise the law of the Federal government, a much wider field for investigation is therefore opened."

"Judge Elsworth is reported on a late occasion to have laid it down as a general rule, that the common law of England,

is the unwritten law of the United States, in their national or federal capacity. Judge Washington also, is said to have delivered a similar opinion, upon another occasion. The like opinion has been advanced on the floor of tke federal house of representatives—concurrent opinions from such respectable authority deserve to be candidly and respectively examined."

"This question is of very great importance, not only as it regards the limits of the jurisdiction of the *federal courts*; but also as it relates to the extent of the powers vested in the *federal government*. For if it be true, that the common law of England has been adopted by the United States, in their national or federal capacity, the jurisdiction of the several courts must be co-extensive with it; or, in other words *unlimited*: so also must be the jurisdiction and authority of the *other branches* of the federal government; that is to say, their powers respectively must be, likewise, *unlimited*. How far this may be the case, is my present purpose to examine with candour."

[T.]

Tucker's Blackstone—Note E. 381, 2, 3, 4.

We are to enquire, whether the several colonies of Great Britain, which now compose the United States of America, brought with them the laws of the mother country, so far as they were applicable to the situation and circumstances of the colonies, respectively, or not.

Although very little doubt upon this part of our inquiry was, perhaps, even entertained in America, yet the celebrated Judge Blackstone, in his Commentaries on the laws of England, expressly denies that the common law of England as such, had any allowance or authority in the British American colonies. "Plantations, or colonies in distant countries, as he observes, are either such where the lands are claimed by the right of occupancy, only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated they have either gained by conquest, or ceded by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between the two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if any uninhabited country be discovered, and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force." Afterwards he adds: "But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but

till he does actually change them, the ancient laws of the country remain, unless such as are against the laws of God, as in the case of an infidel country. Our American plantations are principally of this latter sort; being obtained in the last century, by right of conquest, and driving out the natives, or by treaties. And therefore the common law, as such, has no allowance or authority there.

As I apprehend the opinion here cited is not as correct as many others of the learned commentator, I shall venture to state some objections to it: observing by the way, that his conclusion is applicable only to the colony of New-York, which was originally settled by the Dutch, and afterwards conquered by the English, and ceded to the crown by the treaty of Breda, in 1667, and perhaps to the adjacent colony of Jersey, which was likewise ceded by the same treaty, and was also peopled at that time by the Dutch, the boundaries between the two colonies, being not then established. But with respect to the other colonies; whether they were obtained by purchase from the Indian natives, as was certainly the case with Pennsylvania, and as it has been said, was the case with several others: or whether the territory was acquired by conquest or by cession; in either case, as those persons by whom the colony was settled, were neither the people who were conquered, nor those who were ceded by treaty, to a different sovereignty; but the conquerors themselves or colonists, settling a vacant territory ceded by treaty, the conclusion here made by Judge Blackstone will appear to be erroneous. For Baron Puffendorf informs us, that sovereignty, by way of conquest, is acquired when a nation, having just reason to make war upon another people, reduces them by the superiority of their arms to the necessity of thenceforward submitting to the government of the conquerors. And with respect to countries ceded by treaty, Grotius, tells us, it is not the people that are alienated, but the perpetual right of governing them as a people. Now the British emigrants by whom the colonies were settled, were neither a conquered nor a ceded people, but free citizens of that state, by which, the conquest was made, or, to which, the the territory was ceded; the Indians, the former people, have uniformly withdrawn themselves from the conquered, or ceded, territory. What is here said by Mr. Blackstone, cannot, therefore, be applicable to any colony, which was settled by English emigrants, after the Indian natives had ceded, or withdrawn themselves from, the territory, however applicable it may be to New-York, where the Dutch settlers remained, after they were conquered, and after the perpetual right of governing them as a people, was ceded by the treaty of Breda before mentioned.

This distinction between the English emigrants, and the Indian natives, being once understood, we shall be able to apply to the former, what Grotius says upon this subject, viz. "When a people, by one consent, go to form colonies, it is the original of a new and independent people; for they are not sent out to be slaves, but to enjoy equal privileges and freedom. This sentiment he adopts from Thucydides, who, speaking of the second colony, sent by Corinthians to Epidamus, says, they ordered public notice to be given, that such as were willing to go thither, should enjoy the same rights and privileges as those who staid at home; which corresponds precisely with the declaration contained in Queen Elizabeth's charter, to Sir Walter Raleigh, bearing date March 25, 1584, whereby she promises and engages, that for the purpose of "uniting in more perfect league and amity, such lands and countries as the patentees should settle with the realms of England and Ireland, and for the better encouragement of those who would engage in the enterprize, the said countries so to be possessed and inhabited, should from henceforth be in allegiance and protection of her, her heirs and successors; and further grants to the said Sir Walter Raleigh, his heirs and assigns, and to every other person or persons, to their and every of their heirs, that they and every of them that should hereafter be inhabiting in the said lands, countries, and territories, should and might have and enjoy, all the privileges of free denizens, or persons native of England. The like engagements and stipulations were contained in all the successive charters granted by King James, to the colony of Virginia; from whence it seems probable that the charters of all the other colonies contained the same." If this were the case, we may, without recurring to the authority of the writers on the law of nations, decide upon the ground of compact alone, that the English emigrants who came out to settle in America, did bring with them all the rights and privileges of free natives of England; and consequently did bring with them that portion of the laws of the mother country, which was necessary to the conservation and protection of these rights. A people about to establish themselves in a new country, remote from the parent state, would equally stand in need of some municipal laws, and want leisure and experience to form a code adapted to their situation and circumstances. The municipal laws of the parent state being better known to them, than those of any other nation, a recurrence to them would naturally be had, for the decision of all questions of right and wrong, which should arise among them, until leisure and experience should enable them to make laws better adapted to their own peculiar situation. The laws of the parent state would, from this circumstance, acquire a tacit authority, and reception in all cases to which they were applicable. Of this applicability, the colo-

nists themselves could be the only competent judges ; the grant of a legislature of its own, to each colony, was a full recognition of this principle, on the part of the crown : and sanctioned the exercise of the right, thereby recognized, on all future occasions.

[U.]

3d Aitkins—564.

SKIP *vs.* HARWOOD.

There was a decree in chancery, for a receiver to collect in the partnership debts, and that Mr. Harwood should not dispose of any part of the dead stock :

The morning of the decree, and after it had passed Mr. Harwood, removed 250 butts of beer, in a fraudulent, collusive manner, in order to evade the decree he expected would be made in the cause, for he was present in Court during the hearing.

A few days afterwards, Harwood committed an act of bankruptcy.

The assignees under the commission, who are in possession of the goods that were clandestinely conveyed away, insist that they have a right to detain them, notwithstanding the decree which Mr. *Skip* has obtained, and that he must now come in *pari passer* with other creditors under the commission, particularly as the decretal order had not passed.

LORD CHANCELLOR. As to what has been insisted, that the decretal order is not actually passed, and therefore Mr. Harwood is not guilty of a contempt, his lordship said, where a person, as Mr. Harwood has done, attends a cause to which he is a defendant, the whole time of the hearing, and had notice of the decree by being present when it was pronounced in Court, if he does any act that is a contravention to the decree, he is guilty of a contempt, and punishable for it, notwithstanding the decretal order is not drawn up ; and there are several instances of this kind, or otherwise it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time, before they can be compleatly drawn up.

Lord Hardwicke committed Mr. Harwood to the Fleet for his contempt.

[V.]

Thomas Jones's Reports—178.

THE KING *against* . . . . . STEWARD of . . . .

The defendant appeared upon an attachment, and being examined on interrogatories, he confessed that a writ of *habeas*

corpus was delivered to him to have the body of one in his custody in this Court, and that he would have done it but the prisoner refused to pay the charges and fees of his carriage. *Per cur.* this matter cannot excuse the contempt; for the king's writ ought to be obeyed, and the Court shall tax the charges, and compel payment, if the officer and the prisoner and plaintiff cannot agree, or payment be not made according to the agreement. And this was affirmed by *Livesay*, Secondary, and others to be the course of the Court tho' some of the counsel said the contrary. And though the defendant being examined upon interrogatories for exacting bail of £ 200 on an action of battery in the Court whereof he was the steward, and imprisonment of the defendant there for want of such bail (which the Court here declared to be a great oppression) and upon other matters of contempt; he had denied the said matters upon his oath, yet the court proceeded to the examination of the said matters also, and did not discharge him upon his oath (as is the case where no contempt is confessed) and finding the defendant guilty, committed him to the marshal, where he remained in custody for 9 or 10 days. And afterwards, on his petition, and paying a small fine and costs to the prosecutor was discharged.

[W.]

6th Modern—p. 73.

SAUNDERS *against* MELHUISH.

Melhuish had got an unknown person to assume the name of tenant in possession, and to personate him in receiving a declaration in ejectment; and, upon the usual affidavit, tricked the plaintiff out of his possession.

And the matter being made out by affidavit, and even by the affidavits of the two comrogues, viz. he that delivered, and the other that received the declaration.

The Court ordered restitution, for no man's possession ought to be disturbed upon the affidavit of such infamous witnesses.

And Melhuish, the plaintiff in ejectment, attending, was committed to answer interrogatories. For Holt, Chief Justice, said when one is put to answer interrogatories for a fact fully proved against him, he ought to answer in custody; but where it is any thing doubtful the course is to put him to answer, that is, to bind him by recognizance to answer. And in either case, if they purge themselves upon oath they are discharged, but they may be prosecuted for perjury if they swear false. And if the interrogatories be not exhibited in four days, by the course of the Court they are discharged.

[X.]

8th Modern—110—*B. R.*

WRIGHT *against* MASON.

Upon a motion for an attachment against the defendant, and one *Purcel*, an attorney, for foul practice, and for oppressing plaintiff, for threatening to take him up by a warrant of the Chief Justice, and by colour thereof getting some money from him, and a note under his hand to pay more for not sending him to *Newgate*, for a trespass they pretended to be done by his wife.

A rule was made for them to shew cause, on such a day, why *an attachment* should not go against them.

And upon that day, they appeared and produced several affidavits, which were read in Court, and by which they denied the charge, but not positively and directly.

And it appearing by the affidavits, that the fact was done by the wife, there was no colour to procure the warrant of the Chief Justice against the husband; and it further appearing that the attorney had indorsed this note to another, on purpose to load the plaintiff with an action, he was ordered to stand committed until he should answer *interrogatories*, which were to be filed in *four days*.

And afterwards, in answer to the *interrogatories* he swore off all that was charged against him, for which he was indicted, and convicted of *perjury*.

[Y.]

Dallas's Reports—332—*Notes*.

"With respect to the address itself, MR. Lewis analysed its offensive parts, in order to shew that it treated the judges, with indecent opprobium; that, in some respects, it was inconsistent with truth, and that, in its general operation, it was intended, and could not fail, to excite resentment against Brown, the plaintiff, and compassion for Oswald, the defendant, in the cause.

He now proceeded to consider the mode of punishment, which formed a material part of Mr. Oswald's complaint, and in support of its legality, referred, generally, to the authorities which he had already cited. He observed that much declamation had been wasted upon this topic; and that the proceeding by attachment had been vehemently reprobated as the creature of the Court of Star Chamber. Though that

Court might have employed the process of attachment (of which, however, he did not recollect an instance) yet, he insisted, that it was idle and absurd to consider it as the creature of a jurisdiction, whose own existence was of a much later date, than that of the subject to which we are told it gave birth. To prove this, he stated that the Court of Star Chamber was not instituted till the year 1368 ; that Magna Charta was confirmed, ar least 113 years before that time ; and, as all the authorities concur, in declaring that the process by attachment is as ancient as the laws themselves, and that it was confirmed by Magna Charta, its origin is consequently long antecedent to that of the Court of Star Chamber, 4 *Black. Com.* 280, 281, 282, 283, 284, 285.

But he argued, with great strength and perspicuity, that the process of attachment, which in practice was multiplied into innumerable uses, was essential to the administration of justice ; and, that if the exercise of this power was suppressed, the courts themselves might as well be annihilated. He represented, that it was an established principle in law, that one Court could not punish a contempt committted against another, then, continued he, how shall the Common Pleas repel an injury of that nature ? It is not vested with any criminal jurisdiction, it cannot impannel a grand jury, nor try an indictment ; the only remedy, therefore, which the case can admit, is by an attachment. He applied the same reasoning to the Supreme Court ; and with respect to the Orphans Courts, the Courts of Admiralty, and the Courts of the Registers of Wills, &c. he observed, that their proceedings, according to the civil law, were totally independent of juries ; and that consequently if they were deprived of the process of attachment, it was in vain for them to decide and to decree, for they would then be without any means to enforce obedience to their decisions and decrees. Nay, he added, that without this power, the legislature itself would be exposed to wanton insult and interruption ; and that letters, such as he had received, menacing his existence for his conduct on the present occasion, might be written and avowed with absolute impunity.

He then enumerated many instances in which gross injustice would take place, but for the intervention of this summary proceeding. Where a sheriff refuses, or neglects to return a writ ; or to pay money which he has received upon an execution ; where an inferior Court refuses to transmit a record ; a witness, or juryman, to attend or be sworn ; and where a defendant in ejectment refuses to pay costs, after a nonsuit, for want of a confession of lease entry and ouster ;—in all these and many other cases he demonstrated, that the great, efficient remedy, was by an attachment to be issued against the delin-

quent. In tracing the antiquity of the process by attachment, he remarked, that it was admitted to be a part of the common law, by the most authoritative writers ; and that the common law was a compound of the Danish, Saxon, Norman, Pict, and civil law—1 *Black. Com.* 63. As, therefore, the attachment is derived from the civil law, and the civil law was introduced into England by the Romans, early in the first century, he tho't it impracticable at this day to ascertain its source ; but insisted that enough appeared to prove it to be of immemorial usage, and a part of the law of the land.

He then adverted to the leading objection made by the advocates for Mr. Oswald, that, however the process of attachment might be legal in England, it was not so in Pennsylvania. From a decision in the time of Judge Kinsey, he shewed, that before the revolution, an attachment had issued for a contempt, and that the party had, in fact, answered certain interrogatories filed by order of the Court, so that it only remained to enquire, whether any alteration had been introduced by the constitution of the state. In the 24th section of that instrument, it is declared, that "the Supreme Court, and the several Courts of Common Pleas of this commonwealth, shall, besides the powers usually exercised by such Courts, have the powers of a Court of Chancery, so far as relates, &c." Now, as it appears by the case which occurred while Mr. Kinsey was Chief Justice, that the power of issuing attachments was usually exercised by the Supreme Court, so far from altering the law, this is a direct confirmation of the jurisdiction of the Court, for the greater naturally includes the less ; and if the Court is vested with all its former powers, by what possible construction can we deprive it of this ? But it is answered, that a section in the bills of rights provides, that "in all prosecutions for criminal offences, the trial shall be by jury, &c." True ; but the whole system must be taken together ; or, if we examine a particular part, it must be with a recollection of the immediate subject to which that part relates. For, otherwise, this very section might as properly be brought to prove, that the Judges could not be impeached, (since surely that is not a trial by jury) as that they have not the power of issuing attachments. All cases proper for a trial by jury, the bill of rights clearly meant to refer to that tribunal ; but can any thing more explicitly demonstrate, that the framers of the constitution were aware of some cases, which required another mode of proceeding than their declaration, that "Trial shall be by jury as heretofore ? Who will assert that contempts were ever so tried ? Who will hazard an opinion, that it is possible so to try them ?

But does not the constitution of Pennsylvania further distinguish between the laws of the land, and the judgment of our

peers; furnishing a striking alternative, by the disjunctive particle or? This very sentiment, expressed in the same words, appears in the Magna Charta of England, and yet Blackstone unequivocally inform us, that the process of attachment was confirmed by that celebrated instrument. In the 14th chap. of Magna Charta, it is also said, that "no amercement shall be assessed, but by lawful men of the vicinage;" and who, that is at all acquainted with the law, or with the reason of the law, can think it possible, in that case, to pursue the generality of the expression?

From these analogous principles, therefore, and the construction of ages, we may safely argue on the present occasion. But the wild and hypothetical interpretations, which some men have offered, would inevitably involve us in a labyrinth of error, and eventually endanger that liberty, which they possess, and every honest citizen must wish, to preserve. As to the manner of proceeding upon the attachment, the Court on this occasion have followed the precedent in Mosley s Rep. 250. where it is liberally said, that the defendant shall not be permitted to be examined to bring himself into contempt; but upon proof of the contempt, he shall be allowed to purge himself upon his oath.

Upon the whole Mr. Lewis concluded, that the only grounds of impeachment, were bribery, corruption, gross partiality, or wilful and arbitrary oppression; and that as none of these had been proved, Mr. Oswald's memorial ought to be dismissed. He said, indeed, that it would be preferable to return to the state of nature, than to live in a state of society, upon the terms which the memorial presented;—terms which left the weak and the innocent a prey to the powerful and the wicked; and which gave to falsehood and licentiousness, all that was due to freedom and to truth.

When Mr. Lewis's argument was closed, Mr. Findley, a member from Westmoreland, rose, and delivered his sentiments, with great ability and precision. He acknowledged, that he had received great information and pleasure, from the learned and eloquent speech of the member who preceeded him; but he thought it was unnecessary, upon the present occasion, to explore the dark and distant periods of juridical history. The rights and immunities which formed the great object of the revolution, he contended, were capable of an easy and unequivocal definition; they were not of such remote antiquity as to be lost even to the feelings of the people; and the constitution of the state was the only proper criterion, by which they could be judged and ascertained. He did not, therefore, intend to pursue Mr. Lewis, in the tract of

legal disquisition; but, appealing confidently to the instrument itself, he deemed it to be his duty to pronounce, that the decision of the Supreme Court was a deviation from the spirit and the letter of the frame of government. In doing this, he observed, that he did not mean to assert, that any ground had been shown for the impeachment of the judges. But, on the contrary, he agreed with Mr. Lewis, that bribery, corruption, or a wilful and arbitrary infraction of the law, were the only true causes for instituting a prosecution of that nature; and his candor readily induced him to believe, that as none of these had been proved, neither did any of them actually exist on this occasion. But, he said, it was due to the dearest interests of posterity, that the legislature should act with that circumspection, should decide with that wisdom which, leading on the one hand, to an acquittal of the judges, did not tend, on the other, to establish a baneful and destructive precedent. It was in this point of view, that the present proceeding presented itself to his mind, as a matter of the greatest magnitude and importance; and he said it were better far that Mr. Oswald had suffered in silence and obscurity, than that the attention of the legislature should be awakened, only to give additional strength and authority to the mistaken judgment of the Court.

[Z.]

4th Blackstone—286—7.

If the contempt be committed in the face of the Court the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance and of which the Court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or in very flagrant instances of contempt the attachment issues in the first instance; as it also does if no sufficient cause be shown to discharge, and thereupon the Court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into Court; and when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him for the better information of the Court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation and must by the course of the Court be exhibited within the first 4 days: And, if any of the interrogatories is improper,

the defendant may refuse to answer it, and move the Court to have it struck out. If the party can clear himself upon oath he is discharged; but if perjured, may be prosecuted for the perjury. If he confesses the contempt the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporeal or infamous punishment. If the contempt be of such a nature that when the fact is once acknowledged, the Court can receive no farther information by interrogatories than it is already possessed of (as in the case of a *rescous*) the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the Court.

[A. A.]

An act for the advancement of justice, and more certain administration thereof.

Whereas King Charles the second, by his royal charter to William Penn, esq. for erecting this country into a province, did declare it to be his will and pleasure, that the laws for regulating and governing of property within the said province, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels, and likewise as to felonies, should be and continue the same, as they should be for the time being by the general course of the law in the Kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them: And whereas it is a settled point, that as the common law is the birth-right of English subjects, so it ought to be their rule in British dominions: But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts: Now, forasmuch as some persons have been encouraged to transgress certain statutes against capital crimes, and other enormities, because those statutes have not been hitherto fully extended to this province.

1*st*. Therefore, lest there should be any further failure in that behalf, *Be it enacted*, That all inquests and trials of high treason shall be according to the due order and course of the common law, observing the directions of the statute laws of Great Britain, relating to the trials, proceedings and judgments in such cases.

[B. B.]

Charter to William Penn, Esq.

Charles the ſecond, by the grace of God, king of England, Scotland, France, and Ireland, defender of the faith, &c. To all to whom theſe preſents ſhall come, *Greeting:*

WHEREAS, our truſty and well beloved ſubject, William Penn, Eſquire; ſon and heir of Sir William Penn, deceaſed, (out of a commendable deſire to enlarge our Engliſh empire, and promote ſuch uſeful commodities as may be of benefit to us and our dominions, as alſo to reduce the ſavage natives by a gentle and juſt manner to the love of civil ſociety and chriſtian religion) hath humbly beſought leave of us to tranſport an ample colony unto a certain country herein after deſcribed, in the parts of America not yet cultivated and planted; and hath likewiſe humbly beſought our royal majeſty to give, grant, and confirm all the ſaid country, with certain privileges and juriſdictions, requiſite for the good government and ſafety of the ſaid country and colony, to him and his heirs forever.

[C. C.]

An act to revive and put in force ſuch and ſo much of the late laws of the Province of Pennſylvania as is judged neceſſary to be in force in this Commonwealth, and to revive and eſtabliſh the Courts of Juſtice, and for other purpoſes therein mentioned.

SECT. 1. Whereas by the unconſtitutional power claimed by the Britiſh king and parliament over the American colonies, and the cruel and oppreſſive meaſures which the ſaid king and parliament have purſued to eſtabliſh that power, it became neceſſary for the colonies to declare themſelves free and independent ſtates, which was accordingly done purſuant to a reſolve of the Continental Congreſs: Whereupon all authority being in any perſon under the ſaid king conſequently ceaſed, and the laws enacted by his repreſentatives here became of no force or effect, although the ſame were for the moſt part ſuited to the circumſtances of the people: And whereas it is abſolutely neceſſary, for the well governing every ſtate, that laws properly adapted to the circumſtances of the inhabitants be at all times in force.

SECT. 2. *Be it therefore enacted, and it is hereby enacted, by the repreſentatives of the freemen of the commonwealth of of Pennſylvania in general aſſembly met, and by the authority of the ſame,* That each and every one of the laws or acts of general aſſembly that were in force and binding on the inhabitants of the ſaid province on the fourteenth day of May laſt, ſhall be in force and binding on the inhabitants of this ſtate

from and after the tenth day of February next, as fully and effectually to all intents and purpoſes as if the ſaid laws and each of them had been made and enacted by this general aſſembly; and all and every perſon and perſons whoſoever are hereby enjoined and required to yield obedience to the ſaid laws as the caſe may require, until the ſaid laws or acts of general aſſembly reſpectively ſhall be repealed, or altered, or until they expire by their own limitation; and common law and ſuch of the ſtatute laws of England as have heretofore been in force in the ſaid province, except as is hereafter excepted.

[D. D.]

2d Atkins—page 488–9.

BAKER *versus* HART.

There was an order made juſt before the laſt long vacation, for the appointing a receiver of the rents of an eſtate, in the iſland of Sheppey, belonging to the late Admiral Hoſier. It being neceſſary for the maſter to enquire into the circumſtances of the perſon, propoſed for a receiver, and likewiſe of his ſureties, it was impoſſible to complete it before the long vacation, ſo that the parties intereſted in this affair, were apprehenſive that the tenants would pay their rent into an improper hand, and therefore upon conſultation with the maſter, how they might prevent this inconvenience, he adviſed them to print the order with the recitals of the moſt material facts in the cauſe, relevant to the order, and to diſperſe it among the tenants, which was done accordingly. Some other parties in the cauſe, apply now by petition to the Court, inſiſting that the printing this order was a contempt of this Court, and eſpecially the recital part of it, which, as it is ſingle and detached from the reſt of the cauſe, may look in the eye of the world, as a reflection upon the perſons named in them.

LORD CHANCELLOR. I am very far from approving of the method which has been taken of printing this order, but will always diſcountenance ſuch practice, whenever I meet with it.

As to this particular caſe, it is not at all like the caſe of Huggonſon, the printer of the Champion, becauſe there he did not verbatim print the proceedings in the cauſe, between the executors of Major Roach, and his widow, but by way of narrative took upon him to abuſe ſome perſons, who had made affidavits in the cauſe, and likewiſe the executors, and therefore was extremely different from the preſent caſe; for here does not appear the leaſt intention of reflecting upon the perſons named in the printed order, but done merely by the advice of

the maſter, to prevent the tenants from paying the rent improperly, and to impound it in their hands, till there ſhould be a perſon appointed by the maſter to receive it.

I could wiſh that the orders of this Court, were framed with the ſame ſimplicity, as orders made by the Courts of common law; and, to be ſure, in a great many inſtances they might; but in ſome ſpecial orders, the recitals of the principal facts which induced the Court to make theſe orders, are neceſſarily inſerted, and as the drawing orders in chancery, have been for a long time practiced in this manner, I will not take upon me to alter the courſe of them.

As to the complaint itſelf in the preſent caſe, I am of opinion upon the particular circumſtances, and plain intention in doing it, that though it is not a practice I approve of, yet it was innocently done, and conſequently was no contempt of this Court; and as to this part of the petition his lordſhip, ordered the ſame to be diſmiſſed.

[E. E:]

1*st Dallas's reports*—74—*Respublica* vs. *Mesca et al.*

This was an indictment againſt four *Italians*, for the murder of Captain *Pickles*, and upon the arraignment of the priſoners, the Court aſſigned counſel, who challenged the array, and moved for an award of a *tales de medietate linguæ*; but the attorney general controverted the propriety of the motion, and an argument took place.

In this caſe, the Chief Juſtice *M'Kean*, in delivering the opinion of the Court, among other things ſaid—"The point before the Court has been well argued; and on a full conſideration of the ſubject, we now find little difficulty in pronouncing our deciſion. The firſt Legiſlature under the *commonwealth*, has clearly fixed the rule, reſpecting the extenſion of *Britiſh* ſtatutes, by enacting that "*ſuch of the ſtatutes as have been in force* in the late province of *Pennſylvania* ſhould remain in force, till altered by the Legiſlature:" And it appears in evidence that the 28th Edw. 3, c. 13, has been *in force* in the late province, ſince a *trial per medietatem linguæ* was allowed in the caſe of a burglary committed by one Ottenreed, in the manſion-houſe of Mr. Clifford." "On the ground of the *precedent* which has been ſhewn, we hold ourſelves bound on this occaſion, to allow the challenge, and to grant a trial *per medietatem linguæ*.

[F. F.]

Hawkins, b. 2. p. 142

It ſeems clear from the general reaſon of the law which gives all Courts of record, a kind of diſcretionary power over all abuſes by their own officers in the adminiſtration or execution of juſtice, which bring a diſgrace on the Courts themſelves, as not taking ſufficient care to prevent them; that whenever it ſhall appear that any of ſuch officers have been guilty of any corrupt practice in not ſerving any writ, as where they refuſe to do it, unleſs paid an unreaſonable gratuity from the plaintiff or receive a bribe from the defendant, or give him notice to remove his perſon or effects in order to prevent the ſervice of any writ, the Court which awarded it may puniſh ſuch offences in ſuch manner as ſhall ſeem proper, by attachment, &c.

[G. G.]

M'Kean's laws—page 272.

SECT. 5. And be it further enacted by the authority aforeſaid, that the preſident of the ſupreme executive council, the judges of the ſupreme Court, the judge of the admiralty for the time being, together with three perſons of known integrity and ability, to be appointed and commiſſioned for ſeven years, and removeable from office in the ſame manner as the juſtices of the ſupreme Court now are, be, and they are hereby conſtituted a Court of record, by the name, ſtile, and title of, *High Court of Errors and Appeals;* and the ſaid high Court of errors and appeals, or any four or more of them, ſhall have power and authority to examine all ſuch errors as ſhall be aſſigned or found in or upon any ſuch judgment given in the ſupreme Court, and thereupon to affirm or reverſe the ſame judgment, as the courſe of the common law and juſtice ſhall require; other than for errors to be aſſigned for want of form, in any writ, return, pliant, bill, declaration or other pleading, proceſs, verdict or proceeding whatſoever; and that after the ſaid judgment ſhall be affirmed, or reverſed, the record and proceedings and all things concerning the ſame ſhall be remitted into the ſaid ſupreme Court, to the end that ſuch further proceeding may be had thereupon, as well for execution as otherwiſe, as to juſtice ſhall appertain; and the ſaid Court of errors and appeals ſhall receive, hear and decide all ſuch appeals from the Court of admiralty, and the regiſters of wills and for granting adminiſtrations as aforeſaid.

SECT. 10. And be it further enacted by the authority aforeſaid, that it ſhall be lawful for any party or parties, who have heretofore appealed in any cauſe from the ſupreme Court of the late province of Pennſylvania to the king of

Great Britain in council, and upon which no judgment was had before the fourth day of July, in the year of our Lord one thouſand ſeven hundred and ſeventy ſix, to bring a new writ of error according to the common law, and not otherwiſe, before the ſaid Court of errors and appeals, and the ſaid Court is hereby impowered and enjoined to proceed therein to judgment, as in other cauſes, made cognizable in ſaid Court by this act, provided ſecurity be firſt given, and an affidavit or affirmation, atteſting that the value of the matter in diſpute exceeds the ſum in like caſe herein before limited, be filed as aforeſaid.

SECT. 11. And be it further enacted by the authority aforeſaid, that the ſaid Court of errors and appeals ſhall ſit in the city of Philadelphia, at leaſt twice in every year; that is to ſay, on the ſixth day of April, and twentieth day of September, and if either of the ſaid days ſhould happen to be on a Sunday, then on the next day following; and if there be any cauſes depending before the ſaid Court, ſhall have power to adjourn from time to time, and to require, and compel the attendance of ſheriffs, coroners, conſtables, and other miniſterial officers, as fully as any Court of juſtice in this commonwealth can or may do; and the ſaid Court of errors and appeals may appoint a ſuitable perſon to be their clerk and regiſter, and aſcertain and allow reaſonable and moderate fees to ſuch clerk and regiſter, and to any other officer employed by the ſaid Court.

[H. H.]

M'Kean's laws, page 291.

SECTION 9. And be it further enacted by the authority aforeſaid, that it ſhall and may be lawful for the ſaid auditors, or any two of them, as often as there ſhall be occaſion, to call before them by ſubpœna or ſummons, and in caſe of contempt to iſſue a writ of attachment, in order to compel the appearance of any perſon or perſons who is or may be accountable before the ſaid auditors by virtue of this act, or who the ſaid auditors may reaſonably ſuppoſe is, or are capable of giving evidence or information concerning the ſaid accounts, or any of them; and the ſaid auditors, or any two of them; are hereby authorized to examine, upon oath or affirmation, any perſon as a witneſs reſpecting any ſuch account; which oath or affirmation the ſaid auditors, or any two of them, is hereby empowered to adminiſter; and in caſe any perſon or perſons on whom ſuch ſubpœna or ſummons ſhall be ſerved, being accountable before the ſaid auditors, ſhall refuſe to appear, as in ſuch writ ſhall be expreſſed and directed; or having appeared before the ſaid auditors, ſhall refuſe or neglect, to exhibit his, her, or their accounts, and attend the ſettlement thereof; or, being

commanded as a witneſs, ſhall neglect or refuſe to appear before the ſaid auditors, at the time and place appointed in and by ſuch ſubpœna or ſummons, and ſhall make default thereupon; or, having appeared as aforeſaid, ſhall refuſe to make a full diſcloſure of his, her, or their knowledge in the matter depending before the ſaid auditors; the ſaid auditors, or any two of them, may award on attachment, and commit ſuch delinquent or delinquents to the common goal of the county, there to be holden till ſuch perſon or perſons ſhall ſubmit to the ſaid auditors, and comply with the directions of this act; and all perſons who ſhall be ſummoned as witneſſes by the ſaid auditors, and every ſheriff, coroner, or other officer to whom they ſhall direct their precepts or writs as aforeſaid, ſhall be allowed like fees for their attendance and ſervices as witneſſes ſummoned to appear in the inferior Courts of juſtice, and ſheriffs, coroners, and other officers are entitled to in ſuch Courts; ſuch coſts, together with ſuch further charges accruing, to be levied on the ſeveral delinquents by the ſaid auditors, or any two of them, by warrant in like manner as ſmall debts are recoverable.

[I. I.]

1st vol. laws of Pennsylvania—page 101.

SECT. 8. And if any perſon or perſons, being duly ſummoned to appear in any of the ſaid Orphans' Courts, ten days before the time appointed for their appearance, ſhall make default, the Juſtices may ſend their attachments for contempts, and may force obedience to their warrants, ſentences and orders, concerning any matter or thing cognizable in the ſame Courts, by impriſonment of body, or ſequeſtration of lands or goods, as fully as any Court of equity may or can do.

[J. J.]

1st vol. laws of Pennsylvania—page 261.

SECT. 3. *And be it further enacted*, That no perſon to be diſcharged by this act, ſhall any time hereafter be impriſoned, by reaſon of any judgment or decree obtained for payment of money only, or for any debt, damages, contempts, coſts, ſum, or ſums of money, contracted, occurred, occaſioned, owing, or growing due, before the time of his or her diſcharge; but that upon every arreſt upon every ſuch judgment or decree, or for ſuch debts, damages, or contempts, coſts, ſum, and ſums of money, it ſhall and may be lawful for any Judge of the Court, where the proceſs iſſued, upon ſhewing the duplicate of ſuch priſoner's diſcharge or diſcharges, to releaſe and diſcharge out of cuſtody, ſuch priſoner or priſoners as aforeſaid; and the Judge is hereby empowered ſo to do, ſo as every ſuch priſoner or priſoners, arreſted or detained upon execution, or meſne pro-

ceſs, do give a warrant of attorney to appear to every ſuch action, and to plead thereunto.

[K. K.]

1st vol. Laws of Pennsylvania—page 267.

SECT. 18. And for the more ſpeedy puniſhing gaolers, bailiffs, and others, employed in the execution of proceſs, for extortions, or other abuſes in their reſpective offices and places, *Be it further enacted*, That upon petition of any priſoner or perſon, being, or having been under arreſt, or in cuſtody, complaining of any exaction or extortion by any gaoler, bailiff, or other officer or perſon, employed in the keeping or taking care of any goal or priſon, or the arreſting or apprehending of any perſons or perſons, by virtue of any proceſs or warrant, or any other abuſe whatſoever, committed or done in their reſpective offices or places, unto any of his Majeſty' Courts of record within this province, from whence ſuch proceſs iſſued, or under whoſe power ſuch gaol or priſon is; or to any two Juſtices of ſuch Court, in the time of vacation; or to the Judges of the Supreme Court, or any of them, in their reſpective Seſſions of Oyer and Terminer, or General Gaol Delivery; it ſhall and may be lawful for the ſaid Court, Juſtices or Judges, to hear and determine the ſame in a ſummary way, and to make ſuch order thereupon, for redreſſing ſuch abuſe, and puniſhing of ſuch officer or perſon complained of, and making reparation to the party or parties injured, as they ſhall *think juſt*, together with the full coſts of ſuch complaint; and all orders and determinations which ſhall be made by the ſaid Courts, or of the ſaid Juſtices or Judges reſpectively, in ſuch ſummary way as herein preſcribed, ſhall have the ſame effect, force and virtue, to all intents and purpoſes, as any other orders of the ſaid reſpective Courts; and obedience thereunto may be enforced, either by attachments ordered by the ſaid reſpective Courts, or by attachments to be iſſued under the ſeal of the ſaid Courts, by direction of the Juſtice or Judge making ſuch order.

[L. L.]

1st. Vol. Laws of Pennsylvania, Appendix, note a. p. 21.

Altho' it ſhould be made a queſtion whether the ſtatute laws of England, by the royal charter or otherwiſe did or do extend to this province, yet as the common law is generally allowed to be in force here in ſuch caſes wherein no alterations have been made by act of Aſſembly; and as it appears to have been reſolved in the Earl of Derby's caſe, 4th Inſt. 284, that land granted by letters patent from the crown though out of the realm of England, ſhould deſcend accordingly to the courſe of the common law it is clear, that from the date of the char-

ter, until acts of Assembly were made to alter the same, lands within this province, descended according to the course of the common law.

[M. M.]

1st *Tucker's Blackstone*, 393—411.

From all these considerations it will appear that in our enquiries how far the common law and statutes of England were adopted in the British colonies; or in other words what part of those laws might be deemed applicable to their present situations and circumstances, we must again abandon all hope of satisfaction from any *general theory*, and resort to their several charters, provincial establishments, legislative codes, and civil histories, for information. For although the colonial legislatures are understood to have been inhibited from passing any law derogatory from the sovereignty of the crown, or repugnant to the laws and statutes of England; which seems to have been the only common rule imposed upon them, yet the application of this rule in the several colonies will be found to have been as various as their respective, soils, climates and productions.

[N. N.]

1*st. vol. Dallas's laws—page* 179. *Sect.* 11 & 13.

Sect. 11. *And be it further enacted*, That there shall be holden and kept at Philadelphia a Court of Record twice in every year; *that is to say*, on the twenty-fourth day of September, and the tenth day of April, if the same days, or either, do not happen to be the first day of the week, and in such case the said Court shall be held on the next day following; which said Court shall be called and styled, the Supreme Court of Pennsylvania. And that there shall be three persons of known integrity and ability, commissioned by the Governor, or his Lieutenant for the time being, by several distinct patents or commissions, under the great seal of this province, to be Judges of the said Court, one of whom shall be distinguished in his commission by the name of Chief Justice. And every of the said Justices shall have full power and authority, by virtue of this act, when and as often as there may be occasion, to issue forth writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs of process, returnable to the said Court, and grantable by the said Judges by virtue of their office, in pursuance of the powers and authorities hereby given them.

Sec. 13. And that the said Judges, or any two of them, shall have full power to hold the said Court, and therein to

hear and determine all cauſes, matters and things, cognizable in the ſaid Court, and alſo to hear and determine all and all manner of pleas, plaints and cauſes, which ſhall be removed or brought there from the reſpective General Quarter Seſſions of the Peace and Courts of common pleas, to be held for the reſpective counties of Philadelphia, Cheſter and Bucks, as alſo for the city of Philadelphia, or from any other Court of this province, by virtue of any of the ſaid writs: And to examine and correct all and all manner of errors of the Juſtices and Magiſtrates of this province, in their judgments, proceſs and proceedings in the ſaid Courts, as well in all pleas of the crown, as in all pleas real, perſonal and mixed; and thereupon to reverſe or affirm the ſaid judgments, as the law doth or ſhall direct: And alſo to examine, correct and puniſh the contempts, omiſſions and neglects, favours, corruptions and defaults, of all or any of the Juſtices of the peace, ſheriffs, coroners, clerks and other officers, within the ſaid reſpective counties. And alſo ſhall award proceſs for levying, as well of ſuch fines, forfeitures and amerciaments, as ſhall be eſtreated into the ſaid Supreme Court, as of the fines, forfeitures and amerciaments, which ſhall be loſt, taxed and ſet there, and not paid to the uſes they are or ſhall be appropriated. And generally ſhall, miniſter juſtice to all perſons, and exerciſe the juriſdictions and powers hereby granted concerning all and ſingular the premiſes according to law, as fully and amply, to all intents and purpoſes whatſoever, as the juſtices of the Court of King's Bench, Common Pleas and Exchequer, at Weſtminſter, or any of them, may or can do.

[Q. Q.]

M'Kean's Laws—page 309. *Admiralty Act.*

SECT. 5. *And be it further enacted by the authority aforeſaid*, That if any perſon ſhall neglect or refuſe to deliver up any ſuch capture or ſeizure as aforeſaid to the marſhal of the ſaid Court of Admiralty, or ſhall embezzle or keep back any part of any ſuch capture; or ſhall withhold, embezzle or deſtroy any books, documents, commiſſions, papers, parchments or other writings appertaining to, or found on board of any ſhip or veſſel ſeized as a prize as aforeſaid, ſuch perſon ſo offending ſhall be liable to attachment and to fine, or to fine and impriſonment, at the diſcretion of the ſaid Judge, as a contemner of the ſaid Court of Admiralty, and moreover ſhall forfeit to the uſe of the commonwealth, all ſuch offender's ſhare or part of ſuch capture, to be recovered by indictment; and the ſaid Judge ſhall by order ſtay, during the proſecution, ſuch ſhare or part in the hands of the marſhal, to the end that the ſame may be ſecured upon the conviction of ſuch offender, and paid to the treaſurer of this ſtate.

SECT. 18. *And whereas* the trial of pirates and other ſea felons in the late Britiſh colonies, now the United States of America, hath been heretofore without a jury, and in a method much conformed to the civil law, the exerciſe of which juriſdiction in criminal caſes was contrary to the ſpirit of the common law, although the Legiſlature of England had, by a ſtatute paſſed in the reign of king Henry the eighth, intitled, "*For pirates*," relieved the ſubjects within the realm from this grievance.

SECT. 19. *And whereas* the conſtitution of this ſtate provideth, that in all proſecutions for criminal offences no man can be found guilty without the unanimous conſent of a jury.

SECT. 20. *Be it therefore enacted by the authority aforeſaid*, That all traitors, pirates, felons and criminals, who ſhall offend upon the ſea or within the admiralty juriſdiction, ſhall be enquired of, tried and judged by grand and petit juries, according to the courſe of the common law, in like manner as if the treaſon, felony or crime were committed within one of the counties of this ſtate. And the Juſtices of the Supreme Court, and the Judge of Admiralty, or any two of them, are hereby conſtituted Juſtices of oyer and terminer, and ſhall hold a Court of oyer and terminer in the City of Philadelphia, for the hearing and trying of ſuch offenders. And the ſaid Judge of Admiralty, in the abſence of the Chief Juſtice of the Supreme Court, ſhall preſide in ſuch Court of oyer and terminer; and if any perſon, upon being arraigned before the ſaid Court of oyer and terminer, ſhall ſtand mute, or ſhall not make direct anſwers, ſuch perſon ſhall be deemed to have pleaded not guilty, and the trial ſhall proceed accordingly.

[P. P.]

2d Dallas's ſtate laws—page 22, *ſection* 3.

SECT. 3. *Provided always, nevertheleſs*, That no determination of this board of property ſhall be deemed, taken or conſtrued to extend, in any meaſure whatever, to the preventing either of the parties from bringing their action at the common law, either for the recovery of poſſeſſion, or determining damages for waſte or treſpaſs, but the Courts of law ſhall remain open to the ſaid parties, in as full and ample manner, as if no determination had ever been given.

[Q. Q.]

2d Dallas's ſtate laws—page 48, *ſections* 12—13.

SECT. 12. *Be it further enacted by the authority aforeſaid*, That it ſhall and may be lawful for the ſaid comptroller-general,

as often as there ſhall be occaſion, to call before him, by ſubpœna, or ſummons, and in caſe of contempt to iſſue a writ of attachment, in order to compel the appearance of any perſon or perſons, who the ſaid comptroller-general may reaſonably ſuppoſe is or are capable of giving evidence of information concerning the ſaid accounts, or any of them; and in caſe any perſon or perſons, on whom ſuch ſubpœna or ſummons ſhall be ſerved, ſhall refuſe to appear, as in ſuch writ ſhall be expreſſed and directed, or, having appeared, ſhall refuſe to make a full diſcloſure of his, her or their knowledge in the matter depending before the ſaid comptroller-general, the ſaid comptroller-general may award an attachment, and commit ſuch delinquent or delinquents to the common goal of the county, there to be holden, till ſuch perſon or perſons ſhall ſubmit to the ſaid comptroller-general, and comply with the directions of this act.

SECT. 13. *Provided always, and be it further enacted by the authority aforesaid,* That if, upon any ſubpœna or ſummons requiring the attendance of any perſon or perſons before the ſaid comptroller-general, as aforeſaid, a return be made that ſuch perſon is not to be found within the proper county, that the ſaid comptroller-general may iſſue an attachment, and proceed thereon as aforeſaid, as if ſuch ſubpœna or ſummons had been duly ſerved.

[R. R.]

2d Dallas's state laws—page 472, section 4.

SECT. 4. *And be it further enacted by the authority aforesaid,* That the Juſtices of the ſaid Supreme Court ſhall have original juriſdiction and cognizance of all manner of ſuits, cauſes and actions, within the city and county of Philadelphia, and ſhall have full power and authority to iſſue, under the ſeal of the ſaid Court, writs of *capias ad respondendum*, writs of ſummons, *scire facias*, attachment, partition, dower, and all other writs and proceſs in and upon the ſaid ſuits, pleas and actions, directed to the ſheriff (or coroner, as the caſe may require) of the ſaid county, and returnable before the ſaid Juſtices, on the firſt day of the next term.

[S. S.]

2d Dallas's state laws—page 475, sections 2, 4, 5.

SECT. 2. *Be it enacted, and it is hereby enacted by the representatives of the freemen of the commonwealth of Pennsylvania, in general assembly met, and by the authority of the same,* That from and after the firſt day of Auguſt next, if any perſon ſhall do or perform any worldly employment or buſineſs whatſoever on the Lord's day, commonly called Sunday (works

of neceſſity and charity only excepted) or ſhall uſe or practiſe any unlawful game, hunting, ſhooting, ſport or diverſion whatſoever, on the ſame day, and be convicted thereof, every ſuch perſon, ſo offending, ſhall, for every ſuch offence, forfeit and pay the ſum of thirty ſhillings, to be levied by diſtreſs, or in caſe he or ſhe refuſe or neglect to pay the ſaid ſum, or goods and chattels cannot be found, whereof to levy the ſame by diſtreſs, he or ſhe ſhall ſuffer ſix days impriſonment in the houſe of correction of the proper county.

Sect. 4. *Be it further enacted by the authority aforesaid*, That if any perſon of the age of ſixteen years and upwards, from and after the firſt day of Auguſt next, ſhall profanely ſwear or curſe by the name of God, Chriſt Jeſus, or the Holy Ghoſt, every perſon ſo offending, being thereof convicted, ſhall forfeit and pay the ſum of five ſhillings for every profane oath or curſe; and in caſe he or ſhe ſhall refuſe or neglect to pay the ſaid forfeiture, or goods and chattels cannot be found, whereof to levy the ſame by diſtreſs, he or ſhe ſhall be committed to the houſe of correction of the proper county, not exceeding twenty-four hours for every ſuch offence, of which ſuch perſon ſhall be convicted. And whoſoever ſhall ſwear or curſe by any other name or thing than as aforeſaid, and ſhall be convicted thereof, ſhall forfeit and pay the ſum of three ſhillings for every ſuch oath or curſe; and in caſe ſuch offender neglect or refuſe to ſatisfy ſuch forfeiture, or no goods or chattels can be found, whereof to levy the ſame by diſtreſs, he or ſhe ſhall be committed to the houſe of correction of the proper county, not exceeding twelve hours for every ſuch offence.

Sect. 5. *Be it further enacted by the authority aforesaid*, That if any perſon, from and after the firſt day of Auguſt next, ſhall intoxicate him or herſelf by the exceſſive drinking of ſpirituous, vinous or other ſtrong liquor, and ſhall be convicted thereof, he or ſhe ſhall forfeit and pay the ſum of five ſhillings for every ſuch offence; or if ſuch perſon refuſe or neglect to ſatisfy the ſaid forfeiture, or goods and chattels cannot be found, whereof to levy the ſame by diſtreſs, he or ſhe ſhall be committed to the houſe of correction of the proper county, during thirty-ſix hours for every ſuch offence.

[T. T.]

1*st Wilson*—75.

Rex *vs.* Carrol, *Esq. a Barrister.*

An information for a miſdemeanor was granted laſt term, againſt the defendant, upon the affidavit of *Murphy*; and in the vacation before this term, Carrol indicted *Murphy*, (the proſecutor of the information) for perjury in his affidavit;

and now it was moved for an attachment against Carrol, for a contempt, in endeavouring to evade the justice of this Court; but, *per curiam*, as this Mr. Carrol has found credit with the grand jury, it would be too much for us to grant an attachment against him; but they said this was a practice that but too often happened, and wished there could be some method found out to put a stop to it; and that in the case of the *King* vs. *Rhodes*, the defendant was indicted for forging a will, while the validity thereof was under a proper examination before a Court of delegates; and when the indictment came on to be tried before *Lord Raymond*, he refused to try it; and the Court in the present case granted a rule for an attachment against one *Redman*, for threatening *Murphy*, the prosecutor, with danger of his life, and saying that he would be hanged.

[U. U.]

Dallas's Reports—319.

RESPUBLICA *versus* OSWALD.

On the 12th of *July*, *Lewis* moved for a rule to shew cause why an attachment should not issue against *Eleazar Oswald*, the printer and publisher of the *Independent Gazetteer*.

The case was this: *Oswald* having inserted in his newspapers several anonymous pieces against the character of *Andrew Browne*, the master of a female academy, in the city of *Philadelphia*, *Browne* applied to him to give up the authors of those pieces; but being refused that satisfaction, he brought an action for the libel against *Oswald*, returnable into the supreme Court, *on the 2d day of July*; and therein demanded bail for £. 1000. Previously to the return day of the writ, the question of bail being brought by citation before Mr. *Justice* BRYAN, at his chambers, the judge, on a full hearing of the cause of action, in the presence of both the parties, ordered the defendant to be discharged on common bail; and the plaintiff appealed from this order to the Court. Afterwards, *on the 1st of July*, *Oswald* published, under his own signature, an address to the public, which contained a narrative of these proceedings, and the following passages, which, I conceive, to have been the material grounds of the present motion.

"When violent attacks are made upon a person under pretext of justice, and legal steps are taken on the occasion, not perhaps to redress the supposed injury, but to feed and gratify partisaning and temporising resentments, it is not unwarrantable in such person to represent the real statement of his case, and appeal to the world for their sentiments and countenance.

"Upon these considerations, principally, I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation *as a printer*, and the *rights of the press* and of *freemen*, are fundamentally struck at; and an earnest endeavour is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies."

"But until the news had arrived last *Thursday*, that the *ninth* state had acceded to the new federal government, I was not called upon; and Mr. *Page* in the afternoon of that day visited me in due form of law with a writ. Had Mr. *Browne* pursued me in this line, "without loss of time," agreeably to his lawyer's letter, I should not have supposed it extraordinary—but to arrest me the moment the *federal* intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has been probably dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. *Browne* was merely the *hand-maid* of some of my enemies among the federalists; and in this class I must rank, his great patron Doctor *Rush*, (whose brother is a judge of the *Supreme Court*) I think Mr. *Browne's* conduct has since confirmed the idea beyond a doubt."

"Enemies I have had in the legal profession, and it may perhaps add to the hopes of *malignity*, that this action is instituted in the *Supreme Court* of *Pennsylvania*. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empannelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel on certain memorable occasions, and hope I shall never be a sufferer, let the blast of faction blow with all its furies!"

"The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in *Pennsylvania*: and the vile measures formerly taken to lay me by the heels on this subject only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretence, which oppressive ingenuity or courtly study can invent."

"Upon the trial of the cause, the public will decide for themselves, whether Mr. *Browne's* motives had been laudable and dignified; whether his conduct in declining an acquittal of his character in the paper, and suing me in the manner he did, was decent and consistent; and, in a word, whether he is not actuated by some of my inveterate foes and opponents, to lend his name in their service for the purpose of harrassing and injuring me."

A transcript from the records was read to shew that the action between *Browne* and *Oswald* was depending in the Court; *James Martin* proved that the paper containing *Oswald's* address was bought at his printing-office, fresh and damp from the press; and a deposition, made by *Browne*, was read to prove the preceding facts relative to the cause of action, the hearing before Mr. *Justice* BRYAN, and the appeal from his order.

Lewis then adverted to the various pieces, which were charged as libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed: yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of *Browne*, to whom the education of more than a hundred children was sometimes entrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions *of his character; and* he inferred the necessity of the action, which had been instituted, from this consideration, that if *Browne* were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that he owed to himself and to the public to vindicate his reputation, and to call upon the justice of the laws, to punish so gross a violation of truth and decency. For this purpose, he continued, a writ had been issued, and bail was required. The defendant, if not before, was certainly, on the hearing at the judge's chambers, apprized of the cause of action: The order of Mr. *Justice* BRYAN on that occasion, and the appeal to the court, were circumstances perfectly within his knowledge; and yet, while the whole merits of the cause were thus in suspense, he thought proper to address the public in language evidently calculated to excite the popular resentment against *Browne;* to create doubts and suspicions of the integrity and impartiality of the Judges, who must preside upon the trial; and to promote an unmerited compassion in his own favour. He has described himself as the object of former persecutions upon similar principles; he has asserted that, in this instance, an individual is made the

instrument of a party to destroy him; and he artfully calls upon his fellow citizens to interest themselves to preserve the freedom of the press, which he considers as attacked in his person. Nay, in order to cast an odium upon the new government of the *United States*, he insinuates, that his arrest was purposely protracted 'till the ratification of nine states had given stability to that system: a falsehood, as unwarrantable as it is insidious: for, it will be proved that this delay took place at his own request, communicated by Col. *Proctor*.

Col. *Proctor*, being examined on this point, said, that he, at first, desired the action might not be brought, in hopes of accomplishing a compromise between the parties; that, afterwards, he requested Mr. *Lewis* to defer issuing the writ 'till as near the term as it was possible: but that all this interference was of his own accord, and not at the instance of the defendant. He acknowledged, however, that he had informed *Oswald*, that the commencement of the action would be postponed as long as possible, after having obtained a promise to that effect from Mr. *Lewis*.

Lewis said he was very much mistaken, indeed, if Col. *Proctor* had not mentioned the request as coming from the defendant; and Col. *Proctor* answered, "if ever I told you so, he certainly sent me; but I cannot remember that ever he asked me to do a thing of the kind."

Lewis then added, that the address to the public manifestly tended to interrupt the course of justice; it was an attempt to prejudice the minds of the people in a cause then depending, and, by that means, to defeat the plaintiff's claim to justice, and to stigmatize the Judges, whose duty it was to administer the laws. There could be no doubt, therefore, that it amounted to a contempt of the court; and it only remained, in support of his motion, to shew that an attachment was the legal mode of proceeding against the offender. For this he cited 4 *Black. Com.* 280. 2 *Atk.* 469.

By the Court:—Take a rule to shew cause on *Monday* next, at nine o'clock in the morning.

The defendant appearing on *Monday* the 14th, agreeably to the rule to shew cause, obtained on *Saturday*, prayed that the rule might be enlarged, as he had not had a reasonable time to prepare for the argument. But *Lewis* opposed the enlargment of the rule, observing that the defendant would be heard in extenuation, or excuse, of the contempt, after the attachment had issued.

By M'KEAN, *C. J.*—I know not of any instance where a delay of a term has been allowed in the case of an attachment: one reason for such a summary proceeding is to prevent delay. Let cause be now shewn.

Sergeant, in shewing cause against the attachment, contended, that the doctrine, in 4 *Black. Com.* 280. was laid down much too wide; that in 2 *Atk.* 469, the Chancellor expressly assigns this reason, for his determining without a jury, that he was a judge of *fact*; and in 1 *Burr.* 510. 513. an information is granted on this principle, that courts of common law will not decide upon facts without the intervention of a jury.

M'KEAN, *C. J.*—This was not the reason that influenced the Court in their decision.

But, whatever the law might be in *England*, *Sergeant* insisted, that it could not avail in *Pennsylvania*. Even in *England*, indeed, though it is said to be a contempt to report the decisions of the Courts, unless under the *imprimatur* of the judges; yet, we find *Burrow*, and all the subsequent reporters, proceeding without that sanction. But the constitution of *Pennsylvania* authorises many things to be done which in *England* are prohibited. Here the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of the government; of which the judicial authority is certainly to be considered as a branch. *Const. Penn. sect.* 35.

M'KEAN, *C. J.*—Could not this be done in *England?* Certainly it could: for, in short, there is nothing in the constitution of this state, respecting the liberty of the press, that has not been authorised by the constitution of that kingdom for near a century past.

Sergeant. The ninth *section of the Bill of Rights*, however, puts this supposed offence into such a form, as must entitle the defendant to a trial by jury; and precludes every attempt to compel him to give evidence against himself. It declares, "that, in all prosecutions for *criminal offences*, a man has a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, *by an impartial jury of the country*, without the *unanimous* consent of which jury he cannot be found guilty; *nor can he be compelled to give evidence against himself*; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers."—Now, the present proceeding against the defendant is for a *criminal offence*;

and, yet, if the attachment issues, the essential parts of this section must be defeated: for, in that case, the defendant *cannot be tried by a jury;* and, according to the practice upon attachments, he will *be compelled to answer interrogatories;* in doing which, he must either be guilty of perjury, or *give evidence against himself.* The proceeding by attachment is, indeed, a novelty in this country, except for the purpose of enforcing the attendance of witnesses. Those contempts which are committed in the face of a Court stand upon a very different ground. Even the Court of *Admiralty* (which is not a Court of record) possesses a power a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alledged to have been committed out of doors, are not within this reason; they came properly within the class of *criminal offences;* and, as such, by the ninth section of the bill of rights, the can only be tried by a jury.

M'KEAN, *C. J.*—Do you then apprehend that the 9th *sect.* of the bill of rights introduced something new on the subject of *trials?* I have always understood it to be the law, independent of this section, that the twelve jurors must be *unanimous* in their verdict, and yet this section makes this express provision.

Sergeant said, that he had discussed the subject as well as the little opportunity afforded him would admit. He pressed the Court to give further time for the argument, or, at once, to direct a trial. This he contended was, at least discretionary; and, considering the defendant's protestation of innocence, his readiness to give ample security for his future appearance, the magnitude of the question as arising from the constitution, and its immense consequences to the public, he thought a delay, that was essential to deliberation and justice, ought not to be refused.

Heatly and *Lewis*, in support of the motion, contended, that under the circumstances of the case, *Oswald's* publication, whether true or false, amounted to a contempt of the Court, as it respected a cause then depending in judgment, and reflected upon one of the judges in his official capacity; that the argument of the adverse counsel went so far as to assert, that there could be no such offence as a contempt even in *England*, since the very words inserted in the constitution of *Pennsylvania*, were used in the *Magna Charta* of that kingdom; that, in truth, neither the bill of rights nor the constitution extended to the case of *contempts*, for they mean only to secure to every citizen the right of expressing his senti-

ments with a manly freedom, but not to authorise wanton attacks upon private reputation, or to deprive the Court of a power essential to its own existence, and to the due administration of justice; that the Court were as competent to judge of the fact and the law, upon the inspection of the publication in question, as *the Chancellor* was in the authority cited from *Atkins*; and that although the prosecutor could, perhaps, perhaps, proceed either by indictment or information, yet that the abuses of the *Star Chamber* had rendered the process by information odious, and an attachment, which was sanctioned by immemorial usage, was the most expeditious, and, therefore, the most proper remedy for the evil complained of.

The CHIEF JUSTICE delivered the opinion of the Court to the following effect, Judge BRYAN having shortly before taken his seat.

M'KEAN, *C. J.*—This is a motion for an attachment against *Elcazer Oswald*, the printer and publisher of *the Independent Gazetteer*, of the 1st of *July* last, No. 796. As a ground for granting the attachment, it is proved, that an action for a libel had been instituted in this Court, in which *Andrew Browne* is the plaintiff, and *Eleazer Oswald* the defendant; that a question with respect to bail in that action, had been agitated before one of the Judges, from whose order, discharging the defendant on common bail, the plaintiff had appealed to the Court; and that Mr. *Oswald's* address to the public, which is the immediate subject of complaint, relates to the action thus depending before us.

The counsel in support of their motion, have argued, that this address was intended to prejudice the public mind upon the merits of the cause, by propagating an opinion that *Browne* was the instrument of a party to persecute and destroy the defendant; that he acted under the particular influence of Dr. *Rush*, whose brother is a judge of this Court; and, in short, that from the ancient prejudices of all the judges, the defendant did not stand a chance of a fair trial.

Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. Let us, therefore, enquire, *first*, whether they ought to be considered as a contempt of the Court; and, *secondly*, whether, if so, the offender is punishable by attachment.

And here, I must be allowed to observe, that libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than

his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeller admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? how shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antedote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to *vindicate*, which has been employed to *defame* him; for, many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author, rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeller, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—no!

What then is the meaning of *the Bill of Rights*, and *the Constitution* of *Pennsylvania*, when they declare, "That the freedom of the press shall not be restrained," and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?" However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a *licenser*. The same principles were settled in *England*, so far back as the reign of *William the Third*, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there any thing in the language of the constitution (much less in its spirit and intention) which authorises one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed that the slanderous words, which, which when spoken to a few individuals, would expose the speaker to punishment, become sacred, by

the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the proceedings of government, extends to warrant an anticipation of the acts of the legislature, or the judgments of the Court? and not only to authorise a candid commentary upon what has been done, but to permit every endeavour to biass and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he, who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice,—wilfully seeks to corrupt the source, and to dishonor the administration of justice.

Such is evidently the object and tendency of Mr. *Oswald's* address to the public. Nor can that artifice prevail, which insinuates that the decision of this Court will be the effect of personal resentment; for, if it could, every man might evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion, because their treatment has been such as would naturally excite resentment in the human disposition. But it must be remembered, that judges discharge their functions under the solemn obligations of an oath: and, if their virtue entitles them to their station, they can neither be corrupted by favour to swerve from, nor influenced by fear to desert, their duty. That judge, indeed, who courts popularity by unworthy means, while he weakens his pretensions, diminishes, likewise, the chance of attaining his object; and he will eventually find that he has sacrificed the substantial blessing of a good conscience, in an idle and visionary pursuit.

Upon the whole, we consider the publication in question, as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be

summoned as jurors) with respect to the merits of a cause depending in this Court, and of corrupting the administration of justice: We are, therefore, unanimously of opinion, on the *first* point, that it amounts to a contempt.

It only remains then to consider, whether the offence is punishable in the way that the present motion has proposed.

It is certain that the proceeding by *attachment* is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares, that "trials by jury shall be as *heretofore*;" and surely it cannot be contended, that the offence, with which the defendant is now charged, was *heretofore* tried by that tribunal. If a man commits an outrage in the face of the Court, what is there to be tried?—what further evidence can be necessary to convict him of the offence, than the actual view of the Judges? A man has been compelled to enter into security for his good behaviour, for giving the lie in the presence of the Judges in *Westminster-Hall*.

On the present occasion, is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt, or not, is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the Court, for refusing to exercise their legal power in preventing them.

For these reasons we have no doubt of the competency of our jurisdiction; and we think, that justice and propriety call upon us to proceed by *attachment*.

BRYAN, *Justice*, observed that he did not mean to give an opinion as to the mode of proceeding; but added, that he had always entertained a doubt with respect to the legality of the process by attachment, in such cases, under the constitution of Pennsylvania.

M'KEAN, *C. J.* Will the defendant enter into a recognizance to answer interrogatories, or will he answer *gratis*?

Oswald. I will not answer interrogatories. Let the attachment issue.

M'KEAN, *C. J.* His counsel had better advise him to consider of it.

Sergeant said that the defendant had not had time, even to peruse what had been sworn against him; for only *Sunday* had intervened since the obtaining the rule to shew cause, and that was an improper day for applying to the records of the Court.

M'KEAN, *C. J.* In criminal matters *Sunday* has always been deemed a legal day. There has been as ample time for consideration as could well be allowed; the term will end to-morrow. Will he answer, or not?

Sergeant prayed the Court would grant 'till to-morrow morning to form a determination on the subject, and offered bail for the defendant's appearance at that time.

M'KEAN, *C. J.* Be it so. Let the bail be taken, himself in £. 200, and one surety in the like sum, for his appearance to-morrow morning.

The defendant appearing on the 15th of *July*, in discharge of his recognizance; the CHIEF JUSTICE again asked, whether he would answer interrogatories or not?

Bankson, for the defendant, requested, that the interrogatories might be reduced to writing before he was called upon to determine.

M'KEAN, *C. J.* Is that your advice to him? He must *now* say whether he will answer them or not; they will be filed according to the usuage of the Court, and all just exceptions to them will be allowed.

Bankson. He instructs me to declare that he will not answer interrogatories; and he then began to urge, that there was no contempt committed, but was told by the CHIEF JUSTICE, that, as that point had been determined by an unanimous opinion of the four judges yesterday, at was not now open for argument.

Lewis said, that as a misrepresentation had been industriously spread abroad respecting the conduct of the Court, he thought it proper, at this time, concisely to state the real nature of the present proceedings. It had been asserted that

the Court were about to compel Mr. *Oswald* to convict himself of the offence with which he is charged: but the fact is this, that it is incumbent upon the person who suggests the contempt to prove it by disinterested witnesses; and then, indeed, the defendant is allowed by his own oath to purge and acquit himself, in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. *Oswald's* being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done) but to enable him to avoid the punishment which is the consequence of it. The Court employ no compulsion in this respect. He may either answer, or not, as he pleases: if he does answer, his single oath, in his own favour, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the judgment of the Court must necessarily follow.

M'KEAN, *C. J.* Your statement is certainly right, and the misrepresentation, which is attempted, must either be the effect of wickedness, or ignorance.

Lewis now prayed, that the rule might be made absolute; but remarked, that, according to the authorities, the Court might either do that; or, as the defendant was present, they might proceed at once to pass sentence upon him.

M'KEAN, *C. J.* There can be no occasion, when the party is present, to make the rule for the attachment absolute: the Court will proceed to give judgment.

BRYAN, *Justice.* I was not here when the complaint was made to the Court, when the evidence in support of the motion was produced, or the arguments against it were delivered: I consider myself therefore totally incapacitated for taking any part in this business.

Lewis. We can immediately furnish the Court with the proofs.

BRYAN, *Justice.* Can you furnish me, likewise, with Mr. *Sergeant's* arguments.

Lewis said, that he had not penetration enough to discover any argument in what had been said for the defendant; and having again read all the evidence which had been produced, he recapitulated what he had before said in support of the motion.

Page, the under-sheriff, was then called upon to prove, that the writ in the action of *Browne* vs. *Oswald* had been in his possession, at least twelve days before it was served; and that the delay in serving it arose, at first, from the defendant's being at *Baltimore*; and, afterwards, from his not being at home when the witness had repeatedly called upon him.

BRYAN, *Justice*. I still say, that not having heard what has been offered in extenuation of the offence, I am incompetent to join in any opinion respecting the punishment, I cannot surely be suspected of partiality to libellers: I have had my share of their malevolence. But, it is true, I have not suffered much; for these trifles do not wrankle in my mind.

The CHIEF JUSTICE pronounced the judgment of the Court in the following words:

M'KEAN, *C. J.—Eleazer Oswald*: Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the Court. Some doubts were suggested, whether, even a contempt of the Court, was punishable by attachment: but, not only my brethren and myself, but, likewise, all the judges of *England*, think, that without this power no Court could possibly exist;—nay, that no *contempt* could, indeed, be committed against us, we should be *so truly contemptible*. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt.

But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct: your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you; it is our duty to determine that the former shall be the case.

Upon the whole, therefore, THE COURT pronounce this sentence:—That you pay a fine of £. 10 to the *Commonwealth*; that you be imprisoned for the space of one month, that is, from the 15th day of July to the 15th day of August next; and, afterwards, till the fine and costs are paid.—Sheriff he is in your custody.

[V. V.]

(ABSTRACT.)

1*st Andrew's—B. R.*—196.

An attachment was prayed last Hilary term, by Mr. *Denison* against Mr. *Hilton*, the cursitor of the chancery Court of the county Palatine of Durham, for refusing to make out a mandate, upon an *alias latitat* which issued out of this Court to the bishop of Durham.

Chief Justice, LEE, observed, the present case is similar to that of Mr. Yeates, the *custos brevium* in the common pleas, which was *Mich.* 4. G. 1. A *certiorari* was there awarded out of this Court for removing an original from the common pleas; and for not doing this an attachment was prayed against the officer, upon an affidavit that the said original was amongst a bundle of papers in the office. And although it was sworn on the other side by Yeates, that a *ne recipiatur* was entered against the original, and that this could not be filed before the *ne recipiatur* be taken off, which cannot be done by the practice of the common pleas without leave of that Court; this was held to be no sufficient excuse for Yeates, because as this Court had a power to send a *certiorari*, they may lawfully use all means that are proper for attaining the end of sending it. And he was committed.

The judge quoted several other authorities, and the rule was made absolute.

[W. W.]

Hardwicke's Cases—B. R. 150—*some edit.* 160.

THE KING *vs.* HOLLAND.

Chute last term moved for an attachment against the defendant for a contempt, in not obeying an order of the quarter sessions which was removed into this Court, and confirmed; the order was, that the defendant who was convicted of being the father of a bastard child, should pay so much a week for its maintenance, and an arrear of twenty weeks being demanded, he refused to pay it; and the Court would only grant a rule to shew cause, because they said 'twas not like a refusal to pay costs taxed.

And this term the cause being insufficient, the rule was made absolute, but the attachment was ordered to lie in the sheriff's hands for a week, that he may have an opportunity of paying, if he will.

[X. X.]

Hibernian Journal, No. 128. *Wednesday, May* 30, 1804.

THE KING *v.* SEATON.

This was an indictment against the defendant, son to the Governor of Surat, for sending a challenge to the Right Hon. Mr. Wickham. From the statement of Mr. Erskine, supported by the evidence of Mr. Wickham, it appeared that he had taken under his protection a young gentleman of the name of Flint, who married a sister of the defendant. The young couple remained in Mr. Wickham's house, and he was one of the trustees under their marriage settlement. The defendant having returned from India, was invited to Mr. Wickham's, where he remained a week, and was hospitably treated. Some differences occurred in Mr. Seaton's family, which Mr. W. advised Mr. and Mrs. Flint not by any means to interfere in. After the defendant had returned to his ship which was to convey him to India again, he wrote to Mr. Wickham, saying that he had heard he had advised Mr. and Mrs. Flint to use coercive measures to turn him out of his father's house, and he desired an explanation of his conduct in having done so. Mr. W. replied, that he had given them no advice but what was in confidence as their trustee, and he could enter into no explanation on the subject. The defendant wrote several intemperate letters, and at last sent a challenge by Major Morgan. For this conduct a criminal information was moved against him; but, upon his apologizing, Mr. Wickham declined proceedings.—*Notwithstanding* this lenity, the tenor of the prosecution had no sooner ceased, than he wrote a strange incoherent letter to Mrs. Flint, stating, that if she did not interfere to settle the family disputes, she would be obliged to appear in Court, where, if she told truth, she would disgrace her patron; and, if she did not, she would be put into the pillory in a wooden box at Charing-Cross; that the story would get to Bombay, and in the public newspapers, when it would appear Mr. W. had declined fighting a duel; that no man could be excused for refusing to fight after having interfered in a family dispute; besides, no one ought to refuse after the Duke of York and Mr. Pitt had fought: and after all, the story would get into the house of commons; where some member would get up, and ask Mr. Wickham if it was true that he had refused a challenge? that men had been expelled the house for less offences: that the king, who was at the head of all gentlemen, would strike him out of the privy council: in short, that no man would sit with him, but that he would be looked upon as a fool, and unfit to be entrusted with the affairs of the nation at this time of peril. This letter Mr. and Mrs. Flint deemed it their duty to shew to Mr. W. A short

time after, the defendant sent Mr. W. a letter, which Mr. Wickham transmitted to his uncle, unopened. The defendant called upon Mr. W. on a Sunday evening, and sent in his name. Mr. Wickham, conceiving it was his uncle, went to him. The defendant asked him why he had sent his letter to his uncle? To which Mr. Wickham observed, he had done so, because he thought he was the person who had most influence over him. The defendant said, he might have opened it without fear. Mr. Wickham replied, he could hold no communication with him of any kind: upon which the defendant said, if he did not give him the satisfaction of a gentleman, he was one of the greatest blackguards that ever was. Upon this evidence the jury instantly found the defendant guilty. It appeared Mr. Wickham had not given any advice to use coercive measures against the defendant. He had merely advised Mr. and Mrs. Flint to lay the opinion of an eminent counsel on the subject of the family differences before some common friend.

Lord ELLENBOROUGH hoped the defendant would be in a proper state of mind before he came up to receive judgment. His conduct in writing the letter to his sister, and his subsequent behaviour to the prosecutor, bore the character of illiberal vulgarity. It might be necessary to make him give sureties to keep the peace: at all events he was not to look to a speedy enlargement of his person from confinement. It would be well for him if, by his contrition, he could make his peace with Mr. Wickham.

[Y. Y.]

Douglas—516—*other edit.*—498.

THE KING *against* VAUGHAN.

Cause shewn against a rule for an attachment against the defendant of this Court, after having been struck off the roll.

Lord MANSFIELD stated the practice of the Court to be; that, if the defendant, by his *affidavit*, fully denies the charge, on which the rule for an attachment was granted, *that* is sufficient; the weight of the evidence or the credibility of what is sworn is never considered, but if the defendant is hardy enough to swear falsely, he is left to be punished by indictment: In chancery, he said, they proceed differently: they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge.

[Z. Z.]

Wallace's Reports—100.

HOLLINGSWORTH *vs.* DUANE.

The COURT,—TILGHMAN, *C. J.* GRIFFITH, *J.* (BASSET, *J.* absent)—Immediately gave an opinion. Each of the judges entered into the history of the trial, pointed out the gross falsities and unprincipled tendency of the publication. They stated, that no manner of doubt existed in their minds, either of the expediency or legality of punishing contempts of this nature, by attachment; that in doing so, they neither assumed, nor designed to arrogate jurisdiction; they found themselves by their commission and by the laws of the land, in full possession of it, and bound by their oaths and the high duties of their official station, to exercise a just and lawful discretion in punishing, and as far as they could, preventing by examples, an abuse, which, if not repressed, must overturn the administration of justice. Individually, they disavowed any feelings but those of a desire to discharge their duty. The paper, as far as it reflected on them, (if it meant any reflection) excited no resentment. They were indeed sorry to find that any man should be so lost to decency and truth, as to publish to the world, and in the face of so many witnesses of the falsity, such flagrant calumnies upon the administration of justice. The offence was denominated *a contempt of the court;* but it did not follow that the judges must be attacked; it was equally a contempt when, pending the cause, the party, his witnesses, or the jurors are reflected upon; or indeed, if the publication is only calculated to *influence* the decision of the controversy; the degree, indeed, may vary. They said, that though they knew nothing of the publication, till brought into court on this motion, they considered the prosecution as a meritorious attention to the true interests of society, and an advancement of justice. As to the manner and with what moderation they should exercise their powers in case of the contempt being established, those were matters, about which they were to answer to their consciences and country. Intrusted with the execution of justice and the dearest interests of man, independent of power, and under every moral tie to perform their duty, they should proceed fearless of calumny and above influence of any kind; and if it should be found necessary to punish, the degree should be such, as in their best judgments, might serve rather as an example to prevent future offences, than designed essentially to injure the aggressor.—They therefore direct that the rule for an attachment should be made

Absolute.

[A. 3.]

Wallace's Reports—107.

UNITED STATES *vs.* DUANE.

To give your apology its utmost force, it amounts but to this; that you acted under the impulse of passion. The Court have taken that circumstance into consideration; at the same time, I think myself bound to declare, that passion is no justification of an offence, and cannot go far, even in extenuation. If a plea of that kind were allowed, men of violent tempers would have no inducement to restrain them. I am satisfied that on reflection, you yourself must be sensible that you have acted with extreme impropriety. Your case is attended with circumstances of far greater aggravation than *Oswald's*. But though the Court have power to punish at discretion, it is far from their inclination to crush you, by an oppressive fine, or lasting imprisonment. They hope and believe offences of this kind will be prevented in future by a general conviction of their destructive tendency, and by an assurance that the Court possess both the power and the resolution to punish them. Upon the whole, the judgment of the Court is, that you be imprisoned for thirty days including this day, that you pay the costs of prosecution, and that you stand committed till this judgment be complied with.

[B. 3.]

3d vol. Dallas's State Laws—pages 33 *and* 36.

SECT. 2. *Be it further enacted by the authority aforesaid*, That all such auditors appointed by virtue of this act, two of whom shall be a quorum, shall be, and they are hereby, authorised and empowered to cause, by process of subpœna and attachment, directed to the sheriff or coroner of the county, to come before them, as well such persons as now are, or heretofore have been, or shall be, commissioners or treasurers of such county, or employed by or under such commissioners and treasurers, their respective executors or administrators, as all other persons whom it may be necessary to examine as witnesses, and also to compel in like manner the production of all books, papers, accounts and vouchers, relative to the said public accounts; provided no such subpœna be returnable in less than ten days after the date thereof.

SECT. 10. *Be it enacted by the authority aforesaid*, That the auditors aforesaid, on suggestion to the Court of common pleas that the person or persons to be subpœna'd or attached under this act live not in the county where the cause is pending before such auditors, the said Court shall have full power

and authority to issue any subpœna or attachment into the counties where such person or persons shall so reside, and proceed against such person or persons, in as ample a manner as they may do in causes pending in such Court against witnesses or others, who shall be compellable to attend in or be in contempt of such Courts.

[C. 3.]

Minutes of the Convention—page 67.

Section 9. That in all prosecutions by indictment the accused hath a right to be heard by himself and his counsel; to demand the cause and nature of the accusation; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and a speedy public trial by an impartial jury of the vicinage; nor can he be compelled to give evidence against himself; nor can any man be deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

[D. 3.]

Minutes of the Convention—page 121.

The ninth section of the said seventh article being under consideration, *viz.*

That in all *prosecutions by indictment* the accused hath a right to be heard by himself and his counsel; to demand the cause and nature of the accusation; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his *favor, and* a speedy public trial by an impartial jury of the vicinage; nor can he be compelled to give evidence against himself; nor can any man be deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

It was moved by Mr. Lewis, seconded by Mr. James Ross,

To insert the word *criminal* before the word *prosecutions*, and strike out the words *by indictment*, and to insert, after the words *favor, and*, the following: *in all proceedings by indictment to.*

A division of the question on the said amendments was called by Mr. Smilie, and the same being taken,

The amendments were adopted.

A motion was then made by Mr. Wilson, seconded by Mr. Atlee,

To re-consider the last of the said amendments, viz. *in all proceedings by indictment to*, in order to strike out the words *all*

proceedings, and, in lieu thereof, to insert the word *prosecutions*,

Which was determined in the affirmative,

And the said ninth section thereupon adopted as follows:

That in all criminal prosecutions the accused hath a right to be heard by himself and his counsel; to demand the cause and nature of the accusation; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment to a speedy public trial by an impartial jury of the vicinage; nor can he be compelled to give evidence against himself; nor can any man be deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

[E. 3.]

Constitution of New-York,—Article 35.

SECT. 35. And this convention doth further, in the name and by the authority of the good people of this ſtate, ordain, determine and declare, that ſuch parts of the common law of England, and of the ſtatute law of England and Great-Britain, and of the acts of the legiſlature of the colony of New-York, as together did form the law of the ſaid colony on the 19th day of April, in the year of our Lord one thouſand ſeven hundred and ſeventy-five, ſhall be and continue the law of this ſtate, ſubject to ſuch alterations and proviſions, as the legiſlature of this ſtate ſhall, from time to time, make concerning the ſame.

Constitution of Delaware,—Article 8 *Section* 10.

SECT. 10. All the laws of this ſtate, exiſting at the time of making this conſtitution, and not inconſiſtent with it, ſhall remain in force, unleſs they ſhall be altered by future laws; and all actions and proſecutions now pending, ſhall proceed as if this conſtitution had not been made.

Constitution of Maryland—Section 3.

III. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the courſe of that law, and to the benefit of ſuch of the Engliſh ſtatutes, as exiſted at the time of their firſt emigration, and which, by experience, have been found applicable to their local and other circumſtances, and of ſuch others as have been ſince made in England, or Great-Britain, and have been introduced, uſed, and practiſed, by the courts of law or equity; and alſo to all acts of aſſembly, in force on the firſt of June, ſeventeen hundred and ſeventy-four, except ſuch as may have

since expired, or have been, or may be altered by acts of convention, or this declaration of rights—subject, nevertheless, to the revision of, and amendment or repeal by, the legislature of this state.

Constitution of New-Jersey—Section 22.

XXII. That the common law of England, as well as of much of the statute law, as have been heretofore practised in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, for ever.

[F. 3.]

A L'OUVERTURE de nos conférences, nous avons été frappés de l'opinion, si généralement répandue, que, dans la rédaction d'un code civil, quelques textes bien précis sur chaque matière peuvant suffire, et que le grand art est de tout simplifier en prévoyant tout.

Tout simplifier, est une opération sur laquelle on a besoin de s'entendre, *Tout prevoir*, est un but qu'il est impossible d' atteindre.

Il ne faut point de lois inutiles; elles affaibliraient les lois nécessaires; elles compromettraient la certitude et la majesté de la législation. Mais un grand Etat comme la France, qui est à la fois agricole et commerçant, qui renferme tant de professions différentes, et qui offre tant de genres divers d'industrie, ne saurait comporter des lois aussi simples que celles d'une société pauvre ou plus réduite.

Les lois des douze Tables sont, sans cesse, proposées pour modèle: mais peut-on comparer les institutions d'un peuple naissant, avec celles d'un peuple parvenu au plus haut degré de richesse et de civilisation? Rome, née *pour la grandeur*, et destinée, pour ainsi dire, à être la ville éternelle, tarda-t-elle à reconnaître l'insuffisance de ses premières lois? Les changemens survenus insensiblement dans ses mœurs, n'en produisirent-ils pas dans sa législation? ne commença-t-on pas bientó à distinguer le droit écrit du droit non écrit? ne vit-on pas naître successivement les sénatus-consultes, les plébiscites, les édits des préteurs, les ordonnances des consuls, les règlemens des édiles, les réponses ou les decisions des jurisconsultes, les pragmatiques-sanctions, les rescrits, les édits, les novelles des empereurs? L'histoire de la législation de Rome est, a-peu-pres, celle de la législation de tous les peuples.

Dans les Etats despotiques, où le prince est propriétaire de tout le territoire, où tout le commerce se fait au nom du chef de l'Etat et à son profit, où les particulieres n ont ni liberté, ni volonté, ni propriété, il y a plus de juges et de borreaux que de lois: mais par-tout où les citoyens ont des biens à conserver et à défendre; par-tout ou-ils ont des droits politiques et civils; par-tout où l'honneur est compté pour quelque chose, il faut nécessairement un certain nombre de lois pour faire face à tout Les diverses espèces de biens, les divers genres d'industrie, les diverses situations de la vie humane, demandent des règles différentes. La sollicitude du législateur est obligée de se proportionner à la multiplicité et à l'importance des objets sur lesquels il faut statuer. De là, dans les codes des nations policées, cette prévoyance scrupuleuse qui multiplie les cas particuliers, et semble faire un art de la raison même.

Nous n'avons donc pas cru devoir simplifier les lois, au point de laisser les citoyens sans règle et sans guarantie, sur leurs plus grands intérêts.

Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que se sont ceux mêmes auxquels un code paraît toujours trop volumineux, qui osent prescrire impérieusement au législateur, la terrible tâche de ne rien abandonner à la décision du Juge?

Quoi que l'on fasse, les lois positives ne sauraient jamais entièrement remplacer l'usage de la raison naturelle dans les affaires de la vie. Les besoins de la société sont si multipliés, et leurs rapports si étendus, qu'il est impossible au législateur de pourvoir à tout.

Dans les matières même qui fixent particulièrement son attention, il est une foule de détails qui lui échappent, ou qui sont trop contentieux et trop mobiles pour pouvoir devenir l'objet d'un texte de loi.

Un code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé, que mille questions inattendues viennent s'offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu'elles ont été écrites. Les hommes, au contraire, ne se reposent jamais; ils agissent toujours: et ce mouvement, qui ne s' arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau.

Une foule de choses sont donc nécessairement abandonnées à l'empire de l'usage, à la discussion des hommes instruits, à l'arbitrage des juges.

[G. 3.]

Shakespeare's Henry IV.—*2d part*—*Act* V. *Scene* VI.

Ch. Justice. I am assur'd, if I be measur'd rightly,
our majesty hath no just cause to hate me.

K. Henry. No! how might a prince of my great hopes forget
So great indignities you laid upon me?
What! rate, rebuke, and roughly send to prison,
Th' immediate heir of England! Was this easy?
May this be wash'd in Lethe, and forgotten?

Ch. Justice. I then did use the person of your father;
The image of his power lay then in me;
And, in th' administration of his law,
While I was busy for the commonwealth,
Your highness pleased to forget my place;
The majesty and power of law and justice,
The image of the king, whom I 'presented,
And struck me, in the very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you. If the deed were ill,
Question your royal thoughts, make the case yours;
Be now the father, and propose a son;
Hear your own dignity, so much profan'd;
See your most dreadful laws, so loosely slighted,
Behold yourself, so by a son disdain'd;
And, then imagine me, taking your part,
And, in your power, soft silencing your son:—
After this cold consid'rance, sentence me;
And, as you are a king, speak in your state,

What I have done, that misbecame my place,
My person, or my liege's sovereignty.

K. Henry. You are right, justice, and you weigh this well;
Therefore, still bear the balance and the sword:
And I do wish your honors may increase,
'Till you do live to see a son of mine
Offend you, and obey you, as I did;
You committed me:
For which, I do commit into your hand,
Th' unstain'd sword, that you have us'd to bear,
With this remembrance—That you use the same
With the like bold, just, and impartial spirit,
As you have done 'gainst me. There is my hand,
You shall be as a father to my youth:
My voice shall sound, as you do prompt mine ear.
Now, call we our high court of parliament;
And let us choose such limbs of noble counsel,
That the great body of our state may go
In equal rank with the best govern'd nation;
That war, or peace, or both at once, may be
As things acquainted, and familiar to us;
In which you, father, shall have foremost hand.

[H. 3.]

UNITED STATES *vs.* WORRELL.

District Court of the United States—Pennsylvania District.

The defendant was found guilty of an attempt to bribe the commissioner of the revenue.

Mr. *Dallas*, on the part of the defendant, *in this case*, moved an arrest of judgment, by reason that the circuit Court had no cognizance of the crime charged in the indictment. That the judicial authority of the federal Court must be derived either from the constitution of the United States, or from the act of congress, made in pursuance of that constitution, and that it was incumbent upon the prosecutor to shew, that an offer to bribe the commissioner of the revenue, is a violation of some constitutional or legislative prohibition.

Mr. *Rawle*, the attorney for the district, observed, that "the exception taken in support of the motion in arrest of judgment struck at the whole system of the national government; for if opposition to the pure regular and efficient administration of its affairs could thus be made by fraud, the experiment of force might next be applied, with equal impunity and success. Unless the offence is punishable in the federal Courts; it certainly is not cognizable before any state tribunal. Unless the judicial system of the United States justified a recourse to common law against an individual guilty of a breach of treaty, the offence, where no specific penalty was to be found in the treaty, would therefore remain unpunished."

The court being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the supreme court, upon the important principle of discussion: But the counsel for the prisoner did not think themselves authorised to enter into a compromise of that nature. The court, after a short consultation, and declaring, that the sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge,

That the defendant be imprisoned for three months; that he pay a fine of 200 dollars; and that he stand committed, until this sentence be complied with, and the costs of prosecution paid.

[I. 3.]

1*st Dallas's Reports, page* 293.

TETTER *vs.* RAPESNYDER.

The parties, having consented to a reference, filed a written agreement appointing three persons, without saying "or any two of them," to report; but the clerk, in making out the rule, had so expressed it. The three referees met, though only two of them signed the report; and now *Lawrence* moved to set it aside, on account of this variance between the rule and the agreement of the parties, offering to examine a witness, who was present at the transaction, to show that it was intended all the referees should concur. See *Fitzg.* 215.

To this, *Ingersoll*, for the plaintiff, objected; and said, that where parties have reduced their agreement to writing, particularly in the case of a record, nothing by way of addition or alteration was admissable. To prove a name meant, or a fraud committed, and some other similar circumstances, were, he insisted, the only exceptions to this principle.

But, by THE COURT:—The question is not, whether parole testimony shall be given against a record; but whether the agreement filed in the court, was a sufficient authority to the clerk to make out the rule to any two of the referees. If this was his mistake, it certainly ought not to bear against the defendant.

The witness being examined, and having proved the defendant's allegation, the opposite counsel contended, that as the rule had been before the referees, and was inspected not only by them, but by the parties, it was too late to make the objection; for, it would be unjust to allow this advantage to the defendant, after the whole business had been discussed, and the report agreed upon.

Lawrence proposed reading some cases to shew, that the authority given to the referees by the act of the parties, ought to have been strictly pursued.

But, by THE COURT :—There would have been something equitable in the objection to the report, if only two of the referees had met; but, as it appears that they all entered on the business, though only two of them have subscribed the report, we can consider nothing but the evident mistake of the clerk; and, for that reason alone,

Let the report be set aside.

[K. 3.]

Ramsay's History of the American Revolution, page 199.

Resistance being resolved upon by the Americans—the pulpit—the press—the bench and the bar, severally laboured to unite and encourage them. The clergy of New-England were a numerous, learned and respectable body, who had a great ascendancy over the minds of their hearers. They connected religion and patriotism, and in their sermons and prayers, represented the cause of America as the cause of heaven. The Synod of New-York and Philadelphia, also sent forth a pastoral letter, which was publicly read in their churches. This earnestly recommended such sentiments and conduct as were suitable to their situation. Writers and printers followed in the rear of the preachers, and next to them had the greatest hand in animating their countrymen. Gentlemen of the bench and *of the bar denied* the charge of rebellion, and justified the resistance of the colonists. A distinction founded on law, between the king and his ministry, was introduced. The former, it was contended, could do no wrong. The crime of treason was charged on the latter, for using the royal name to varnish their own unconstitutional measures. The phrase of a ministerial war became common, and was used as a medium for reconciling resistance with allegiance.

[M. 3.]

Hume's History of England, vol. 4, *page* 275.

Encouraged by this success, the commons carried their scrutiny, and still with a respectful hand, into other abuses of importance. The great seal was, at that time, in the hands of the celebrated Bacon, created viscount St. Albans; a man universally admired for the greatness of his genius, and beloved for the courteousness and humanity of his behaviour. He was the great ornament of his age and nation; and nought was wanting to render him the ornament of human nature itself, but that strength of mind which might check his intemperate desire of preferment, that could add nothing to his dignity, and might restrain his profuse inclination to expence, that could be requisite neither

for his honor nor entertainment. His want of economy, and his indulgence to servants, had involved him in necessities; and, in order to supply his prodigality, he had been tempted to take bribes, by the title of presents, and that in a very open manner, from suitors in chancery. It appears that it had been usual for former chancellors to take presents; and it is pretended that Bacon, who followed the same dangerous practice, had still, in the seat of justice, preserved the integrity of a judge, and had given just decrees against those very persons, from whom he had received the wages of iniquity. Complaints rose the louder on that account, and at last reached the house of commons, who sent up an impeachment against him to the peers. The chancellor, conscious of guilt, deprecated the vengeance of his judges, and endeavored, by a general avowal, to escape the confusion of a stricter inquiry. The lords insisted on a particular confession of all his corruptions. He acknowledged twenty-eight articles; and was sentenced to pay a fine of 40,000 pounds, to be imprisoned in the tower during the king's pleasure, to be forever incapable of any office, place, or employment, and never again to sit in parliament, or come within the verge of the court.

[I. 3.*]

* [See this authority in Appendix, page 27, note T.]

[N. 3.]

Hume's History of England, vol. 6, page 217.

The violent Jefferies succeeded after some interval, and showed the people, that the rigours of the law might equal, if not exceed, the ravages of military tyranny. This man, who wantoned in cruelty, had already given a specimen of his character in many trials, where he presided; and he now set out with a savage joy, as to a full harvest of death and destruction. He began at Dorchester; and thirty rebels being arraigned, he exhorted them, but in vain, to save him, by their free confession, the trouble of trying them: And when twenty-nine were found guilty, he ordered them, as an additional punishment of their disobedience to be led to immediate execution. Most of the other prisoners, terrified with this example, pleaded guilty: and no less than two hundred and ninety-two received sentence at Dorchester. Of these, eighty were executed. Exeter was the next stage of cruelty: Two hundred and forty-three were there tried, of whom a great number were condemned and executed. He also opened his commission at Taunton and Wells; and every where carried consternation along with him. The juries were so struck with his menaces, that they gave their verdict with precipitation; and many innocent persons, it is said, were involved with the guilty. And on the whole, besides those who

were butchered by the military commanders, two hundred and fifty-one are computed to have fallen by the hand of justice. The whole country was strewed with the heads and limbs of traitors. Every village almost beheld the dead carcase of a wretched inhabitant. And all the rigours of justice, unabated by any appearance of clemency, were fully displayed to the people by the inhuman Jefferies.

[O. 3.]

Hume's History of England, vol. 4, page 169.

The queen's menace, of trying and punishing Hayward for treason, could easily have been executed, let his book have been ever so innocent. While so many terrors hung over the people, no jury durst have acquitted a man, when the court was resolved to have him condemned. The practice also of not confronting witnesses with the prisoner, gave the crown lawyers all imaginable advantage against him. And, indeed, there scarcely occurs an instance during all these reigns, that the sovereign or the ministers were ever disappointed in the issue of a prosecution. Timid juries, and judges who held their offices during pleasure, never failed to second all the views of the crown. And as the practice was anciently common, of fining, imprisoning, or otherwise punishing the jurors, merely at the discretion of the court, for finding a verdict contrary to the direction of those dependent judges; it is obvious, that juries were then no manner of security to the liberty of the subject.

[P. 3.]

Hume's History of England, vol. 6, page 225.

The smallest approach towards the introduction of popery, must, in the present disposition of the people, have afforded reason of jealousy; much more so wide a step as that of dispensing with the tests, the sole security which the nation, being disappointed of the exclusion-bill, found provided against those dreaded innovations. Yet was the king resolute to persevere in his purpose; and having failed in bringing over the parliament, he made an attempt, with more success, for establishing his dispensing power, by a verdict of the judges. Sir Edward Hales, a new proselyte, had accepted a commission of colonel; and directions were given to his coachman to prosecute him for the penalty of five hundred pounds, which the law, establishing the tests, had granted to informers. By this feigned action, the king hoped, both from the authority of the decision, and the reason of the thing, to put an end to all questions with regard to his dispensing power.

[Q. 3.]

Hume's History of England, vol. 6, page 163.

The first person, on whom the ministers fell, was one College, a London joiner, who had become extremely noted for his zeal

against popery, and was much connected with Shaftesbury and the leaders of the country party. For as they relied much upon the populace, men of College's rank and station were useful to them. College had been in Oxford armed with sword and pistol during the sitting of the parliament; and this was made the foundation of his crime. It was pretended that a conspiracy had been entered into to seize the king's person, and detain him in confinement, 'till he should make the concessions demanded of him. The sheriffs of London were in strong opposition to the court; and it was not strange, that the grand jury named by them rejected the bill against College. The prisoner was therefore sent to Oxford, where the treason was said to have been committed. Lord Norris, a courtier, was sheriff of the county; and the inhabitants were in general devoted to the court party. A jury was named, consisting entirely of royalists; and though they were men of credit and character, yet such was the factious rage which prevailed, that little justice could be expected by the prisoner. Some papers, containing hints and directions for his defence, were taken from him, as he was conducted to his trial: An iniquity, which some pretended to justify by alleging, that a like violence had been practised against a prisoner during the fury of the popish plot. Such wild notions of retaliation were, at that time propagated by the court party.

[R. 3.]

Smollet's continuation of the Hist. of Eng. vol. 8, page 307.

The commons of England, in order to evince their loyalty, brought in a bill, denouncing the penalties of high treason against those who should maintain correspondence with the sons of the pretender. In the upper house, lord Hardwicke, the chancellor, moved, that a clause should be inserted, extending the crime of treason to the posterity of the offenders, during the lives of the pretender's sons. The motion, which was supported by the whole strength of the ministry, produced a warm debate, in which the duke of Bedford, the earl of Chesterfield, the lords Talbot and Hervey, argued against it in the most pathetic manner, as an illiberal expedient, contrary to the dictates of humanity, the law of nature, the rules of common justice, and the precepts of religion; an expedient that would involve the innocent with the guilty, and tend to the augmentation of ministerial power, for which purpose it was undoubtedly calculated. Notwithstanding these suggestions, the clause was carried in the affirmative, and the bill sent back to the commons, where the amendment was vigorously opposed by lord Strange, lord Guernsey, Mr. W. Pitt, and other members by whom the original bill had been countenanced. The majority, however, declared for the amendment, and the bill obtained the royal assent.

[S. 3.]

Addison's Trial, page 92.

We know from our own times, as well as from the history of ancient days, that a majority of the judges, in courts of law, have been capable of delivering illegal, unconstitutional, and even criminal opinions. On such occasions, were the minority bound to silence? Whatever may have been the rule of the day, in the case of the ship-money, and the case of the seven bishops, mankind have since consecrated to everlasting fame, the names of those who honorably spurned the slavish doctrine. Let the doctrine prevail, and I see not why a puppet, or a China mandarin, would not form as good an associate judge for the honorable president as a Coke or a Mansfield.

[T. 3.]

Votes of the Assembly of 1776, page 43.

JUNE 24, 1776, P. M.

The committee appointed for that purpose brought in a draft of a declaration, on the subject of the independence of this colony, of the crown of Great-Britain, which was ordered to be read by special order, the same was read a second time, and being fully considered, it was with the greatest unanimity of all the members agreed to and adopted, and is in the words following, viz.

WHEREAS George the third, king of Great-Britain, &c. in violation of the principles of the British constitution; and of the laws of justice and humanity, hath by an accumulation of oppressions unparalleled in history excluded the inhabitants of this, *with the other American colonies, from his protection*; and whereas he hath paid no regard to any of our numerous and dutiful *petitions* for a redress of our complicated grievances, but hath lately purchased foreign troops to assist in enslaving us; and hath excited the savages of this country to carry on a war against us; as also the negroes to embrue their hands in the blood of their masters, in a manner unpractised by civilized nations; and hath lately insulted our calamities, by declaring that he will shew us no mercy until he has reduced us: And whereas the obligations of allegiance (being reciprocal between a king and his subjects) are now dissolved on the side of the colonists, by the despotism of the said king, insomuch that it now appears that loyalty to him is treason against the good people of this country: And whereas not only the parliament, but, there is reason to believe, too many of the people of Great-Britain, have concurred in the aforesaid arbitrary and unjust proceedings against us: And whereas the public virtue of this colony (so essential to it's liberty and happiness) must be endangered by a future political union with or dependance upon a crown and nation so lost to justice, patriotism and magnanimity; "We the DEPUTIES of the people of Penn-

sylvania, assembled in FULL PROVINCIAL CONFERENCE, for forming a plan for executing the resolve of congress of the 15th of May last, for suppressing all authority in this province derived from the crown of Great-Britain; and for establishing a government upon the authority of the people only, now in this public manner in behalf of ourselves, and with the approbation, consent and authority of our constituents, UNANIMOUSLY declare our willingness to concur in a vote of the congress, declaring the united colonies free and independent states, provided the forming the government, and the regulation of the internal police of this colony be always reserved to the people of the said colony; and we do further call upon the nations of Europe; and appeal to the great arbiter and governor of the empires of the world, to witness for us, that this declaration did not originate in ambition, or in an impatience of lawful authority; but that we were driven to it, in obedience to the first principles of nature, by the oppressions and cruelties of the aforesaid king and parliament of Great-Britain, as the only possible measure that was left us to preserve and establish our liberties, and to transmit them inviolate to posterity."

Ordered, That this declaration be signed at the table; and that the president deliver it in congress.

[U. S.]

Constitution of 1790.—*Bill of Rights.*

Sect. 13. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

[V. S.]

1*st Tucker's Blackstone, pages* 30 *and* 39.

Thus while a democracy may be pronounced to be the only legitimate government, and that form of government, alone, which is compatible with the freedom of the nation, and the happiness of the individual, we may perceive that it is on every side surrounded by enemies, ready to sap the foundation, convulse the frame, and totally destroy the fabric.

There is not in nature a spirit more subtle than aristocracy; nothing more unconfinable; nothing whose operations are more constant, more imperceptible, or more certain of success; nothing less apt to alarm in infancy; nothing more terrible at maturity.

[W. S.]

1*st Tucker's Blackstone, pages* 378* *and* 394.

The legislature of Virginia, the most ancient of the British colonies, was constituted by letters patent of March the 9th, 1607,

* For this extract, see Appendix, note S. page 26—and also page 27.

in the fourth year of king James the first; the first charter granted by queen Elizabeth, to sir Walter Raleigh, bore date March 25th, 1584, about three and twenty years before: it is not of much consequence from which of these periods we date the obligation of the laws of England. They seem to have been adopted by consent of the settlers, which might easily enough be done, whilst they were few, and living altogether. Of such adoption, however, we have no other proof, than their practice until the year 1661, when they were expressly adopted by an act of the assembly, which declares, "that they had endeavored, in all things, as near as the capacity and constitution of the country would admit, to adhere to those excellent and often refined laws of England, to which they profess and acknowledge all reverence and obedience; and that the laws made by them are intended by them but as brief memorials of that which the capacity of the courts is utterly unable to collect out of its vast volumes, though sometimes, perhaps, for the difference of condition, varying in small things." The several charters of queen Elizabeth and king James, stipulated that lands in Virginia should be held of the crown in free and common socage.

[X. 3.]

1*st Tucker's Blackstone, page* 405.

And here we may premise, that by the rejection of the sovereignty of the crown of England, not only all the laws of that country by which the dependence of the colonies was secured, but the whole *lex prerogativa* (or *Jura Coronæ* before mentioned) so far as respected the person of the sovereign and his prerogatives as an individual, was utterly abolished: and, that so far as respected the kingly office, and government, it was either modified, abridged, or annulled, according to the several constitutions and laws of the states, respectively: that every rule of the common law, and every statute of England, founded on the nature of regal government, in derogation of the natural and unalienable rights of mankind; or, inconsistent with the nature and principles of democratic governments, were absolutely abrogated, repealed, and annulled, by the establishment of such a form of government in the states, respectively. This is a natural and necessary consequence of the revolution, and the correspondent changes in the nature of the governments, unless we could suppose that the laws of England, like those of the Almighty Ruler of the universe, carry with them an intrinsic moral obligation upon all mankind. A supposition too gross and absurd to require refutation.

[Y. 3.]

1*st Tucker's Blackstone, pages* 409 and 426.

These constitutional declarations (among many others of a similar nature, contained, not only in the constitution of Mas-

sachusetts, but in those of the far greater part of the states in the union) establish, beyond the reach of a doubt, I apprehend, the several points premised, under this head. And here we may remark, in the way, that by these constitutional declarations all the colonial laws, (of whose validity, as being repugnant to the common law, and statutes of England, great doubts had been entertained during the colonial government,) were, thenceforth, unquestionably established, how repugnant, soever, they might have been to the common law, or statutes of England, or the conditions of their charter. The adoption of the laws of England, we see was confined to such as had been theretofore adopted, used, and approved, *within* the colony, and usually practised on, in the courts of law; with an exception as to such parts as were repugnant to the rights and liberties contained in the constitution. It was therefore essential to the force and obligation of any rule of the common law, that it had been before that time actually adopted, used, or approved, *in* the colony: and further, that it should not be repugnant to the rights and liberties contained in the constitution. Otherwise, although it might be found in every law treatise from Bracton, and Glanville, to Coke, Hale, Hawkins, and Blackstone; or in every reporter from the year-books to the days of Lord Mansfield, it would have no more force in Massachusetts, than an edict of the emperor of China.

The constitution of Pennsylvania, declares, that all men have a natural, inherent right to emigrate from one state to another that will receive them, whenever they think, that thereby, they may promote their own happiness. Virginia, made a law to the same effect, in the year, 1783, which still continues to be a part of her code. The English jurists deny to the subjects of the crown of Great-Britain the right of expatriation, a doctrine which they contend is derived from the common law. In those states which have adopted the common law under certain limitations, but have made no declaration in their constitution, nor any legislative act upon the subject, the right of expatriation may still be questionable. But ought it to be questioned in Pennsylvania, or Virginia, (both which states have, in the most solemn and explicit manner repealed the law,) because it is still questionable in Connecticut, where the law was, perhaps, not repealed, because the right had never before been questioned. What a snare is it for the feet of the citizens of the United States, if obsolete maxims of this kind, may be revived at the discretion of a judge, and enforced with severe penalties, notwithstanding they may have been expressly repealed and annulled in the most solemn manner by the authority of the states, respectively! What principle can be established, more inimical to the independence of sovereign states, or more destructive to the liberty, security, and happiness of the citizen,

than, that the unwritten law of a foreign country, differing from them in the fundamental principles of government, is paramount to their own written laws, and even to those *constitutions*, which the *people* had sealed with their blood, and declared to be *forever inviolable!* Such, however, is the necessary, and inevitable consequence, of this constructive grant of jurisdiction in all cases at *common law*, to the courts of the United States, or to any department of the federal government.

[Z. 3.]

4 Tucker's Blackstone, Appendix, note B. page 11.

As the natural end and sole purpose of all civil power is the general good of the whole body, in which the governors, or public functionaries, themselves, are necessarily included as a part, so, that civil power alone can be justly assumed, or claimed by any governor, or public functionary, which is delegated to him by the constitution of the state, as necessary, or conducive to the prosperity of the whole body united; what is not so delegated is unjust upon whatever pretence it is assumed. Any contract or consent conveying useless or pernicious powers is invalid, as being founded on an error about the nature of the thing conveyed, and its tendency to the end proposed.

[A. 4.]

Tucker's Blackstone, page 12.

The most natural method of constituting, or continuing civil power must, since the general use of letters, be some deed, or instrument of convention, between those who set about to establish a civil society or state, to serve as an evidence of their common intentions in forming such an association; to limit the powers which they meant to confer upon their public functionaries, and agents: and to prescribe the mode by which those agents shall be from time to time appointed, and the powers confided to them administered. And if it should happen that time and experience may demonstrate that the people have adopted, or consented to a pernicious plan; whose destructive tendency they have discovered; and now see their error; taking that plan to tend to their good, which they find has the most opposite tendency; they are free from its obligation, and may insist upon a new model of polity.

[B. 4.]

Tucker's Blackstone, page 87. [86.]

The constitution of the state must therefore, be considered as the act of the people, equally as the dissolution of the former government; both being not only in form, but in effect, from the nature and necessity of the case, one and the same

act. To question the validity of the one, is to deny that of the other; the powers necessary to both being the same, and the one a consequence unavoidably and indispensably flowing from the other.

[C. 4.]

State Laws, Carey's edition, 101.

[We could not find the authority read by Mr. Boileau in folio 101 of any volume of Mr. Carey's edition.]

[D. 4.]

4th State Laws, page 60.

SECT. I. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the supreme court shall be established, in the same manner, and with the same powers, as it hath been heretofore established by the laws of this commonwealth, consistently with the provisions made in and by the constitution of this state: *Provided nevertheless,* That from and after the thirty-first day of August next, there shall be only three terms of the said court holden in every year; that is to say, one term beginning on the first Monday in January, which term shall continue three weeks; and no longer; another term beginning the first Monday in April; and a third term beginning on the first Monday in September; each of which last mentioned terms shall continue two weeks, and no longer: And that the courts of nisi prius shall be held at such intermediate times, as the justices of the said court shall judge most convenient for the people.

[E. 4.]

3d State Laws, page 7.

SECT. XI. And for preventing unjust vexation by reiterated commitments for the same offence, *Be it further enacted by the authority aforesaid,* That no person, who shall be delivered or set at large upon an *Habeas Corpus,* shall, at any time thereafter, be again committed or imprisoned for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause, and if any other person or persons shall knowingly, contrary to this act, re-commit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence, or supposed offence, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner, or party grieved, any pretence of variation in the warrant or warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner, or party grieved, in manner aforesaid.

[I. 4.]

Godwin's Political Justice, page 290.

One result of the institution of law is, that the institution once begun, can never be brought to a close. Edict is heaped upon edict, and volume upon volume. This will be most the case, where the government is most popular, and its proceedings have most in them of the nature of deliberation. Surely this is no slight indication that the principle is wrong, and that of consequence, the farther we proceed in the path it marks out to us, the more we shall be bewildered. No task can be less hopeful than that of effecting a coalition between a right principle and a wrong. He that seriously and sincerely attempts it, will perhaps expose himself to more palpable ridicule, than he who, instead of professing two opposite systems, should adhere to the worst.

There is no maxim more clear than this, "Every case is a rule to itself." No action of any man was ever the same as any other action, had ever the same degree of utility or injury. It should seem to be the business of justice, to distinguish the qualities of men, and not, which has hitherto been the practice, to confound them. But what has been the result of an attempt to do this in relation to law? As new cases occur, the law is perpetually found deficient. How should it be otherwise? Lawgivers have not the faculty of unlimited prescience, and cannot define that which is infinite. The alternative that remains, is either to *wrest the law to include a case* which was never in the contemplation of the author, or to make a new law to provide for this particular case. Much has been done in the first of these modes. The *quibbles* of lawyers and the arts by which they refine and distort the sense of the law, are proverbial. But, though much is done, every thing cannot be thus done. The abuse would sometimes be too palpable. Not to say, that the very education that enables the lawyer, when he is employed for the prosecutor, to find out offences the lawgiver never meant, enables him, when he is employed for the defendant, to find out subterfuges that reduce the law to a nullity. It is therefore perpetually necessary to make new laws. These laws, in order to escape evasion, are frequently tedious, minute and circumlocutory. The volume in which justice records her prescriptions is forever increasing, and the world would not contain the books that might be written.

[M. 4.]

Jefferson's Notes, page 249.

These magistrates have jurisdiction both criminal and civil. If the question before them be a question of law only, they decide on it themselves: but if it be of fact, or of fact and law com-

bined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact. If they be mistaken, a decision against right, which is casual only, is less dangerous to the state, and less afflicting to the loser, than one which makes part of a regular and uniform system. In truth it is better to toss up cross and pile in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.

[P. 4.]

Addison's Trial, page 107.

Another pretence has been suggested as an excuse; ignorance of the contents of the paper, and ignorance of the law, on the right of Mr. Lucas. "I am not, says the learned judge, to be charged and punished, unless it is proved, that I have committed an offence, that I knew the act to be an offence, and committed it with an evil intention." Lawyers are accustomed to hear, that ignorance of the law is no excuse, even in a common farmer who has never opened a law book. What shall we say of a presiding judge, emphatically a legal character, and claiming to be the exclusive organ of the court in which he presides, setting up the plea of ignorance as a justification for such an outrage?

[Q. 4.]

Montesquieu's Spirit of Laws, pages 103, '4, '8, '12.

In monarchies, the administration of justice, which decides not only in whatever belongs to life and property, but likewise to honor, demands very scrupulous inquiries. The delicacy of the judge increases in proportion to the increase of his trust, and of the importance of the interests on which he determines.

We must not therefore be surprised to find so many rules, restrictions, and extensions in the laws of those countries, rules that multiply the particular cases, and seem to make of reason itself an art.

The monarch who knows each of his provinces, may establish different laws, or tolerate different customs. But as the despotic prince knows nothing, and can attend to nothing, he must take general measures, and govern by a rigid and inflexible will, which throughout his whole dominions produces the same effect; in short, every thing bends under his feet.

In proportion as the decisions of the courts of judicature are multiplied in monarchies, the law is loaded with decrees that sometimes contradict one another; either because succeeding judges are of a different way of thinking, or because the same causes are sometimes well, and at other times ill defended; or, in fine, by reason of an infinite number of abuses, to which all human regulations are liable. This is a necessary evil, which the legislature redresses from time to time, as contrary even to the spirit of moderate governments. For when people are obliged to have recourse to courts of judicature, this should come from the nature of the constitution, and not from the contradiction or uncertainty of the law.

But in moderate governments, where the life of the meanest subject is deemed precious, no man is stript of his honor or property but after a long inquiry; and no man is bereft of life, until his very country has attacked him, an attack that is never made without leaving him all possible means of making his defence.

Hence it is, that when a person renders himself absolute, he immediately thinks of reducing the number of laws. In a government thus constituted, they are more affected with particular inconveniences, than with the liberty of the subject, which is very little minded.

In republics it is plain, that as many formalities at least are necessary as in monarchies. In both governments they increase in proportion to the value which is set on the honor, fortune, liberty and life of the subject.

In republican governments, men are all equal; equal they are also in despotic governments: in the former, because they are every thing; in the latter, because they are nothing.

Solon knew how to prevent the abuse which the people might make of their power in criminal judgments. He ordained, that the court of Areopagus should re-examine the affair; that if they believed the party accused was unjustly acquitted, they should impeach him again before the people; that if they believed him unjustly condemned they should prevent the execution of the sentence, and make them rejudge the proceeding. An admirable law, that subjected the people to the censure of the magistracy which they most revered, and even to their own!

In affairs of this kind, it is always proper to throw in some delays, especially when the party accused is under confinement; to the end that the people may grow calm, and give their judgment cooly.

In despotic governments, the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance: the more confidence, honor, affection, and security in the subject, the more extended is the power of the monarch.

[S. 4.]

Jefferson's Notes, page 229.

The time to guard against corruption and tyranny, is before they shall have gotten on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.

[T. 4.]

1st Dallas's Reports, page 86.

RESPUBLICA *vs.* DOAN.

Aaron Doan, being attained of a robbery in the county of *Bucks*, by process of *Outlawry*, he was brought before the court on the 24th day of *September* 1784, and, after hearing his counsel upon several exceptions to the outlawry, (which were all over-ruled) execution was awarded against him on the 9th day of *October*. The following correspondence then took place between the honorable the *supreme executive council*, and the judges; in the course of which several important points of law were stated and considered.*

On the 22d of *November* 1784, the president and supreme executive council addressed the following letter to the judges.

Gentlemen,

We have perused, and attentively considered, the transcript of the record transmitted by you, of the attainder of *Aaron Doan*; and as it appears to us, a case of a novel and extraordinary nature, which, being once established as a precedent, may greatly affect the lives, liberties, and fortunes, of the freemen of this commonwealth, we cannot, consistently with our ideas of duty, issue a warrant for his execution, until the doubts and difficulties that present themselves to our view, are removed.

To take away the life of a man without a fair and open trial, upon an implication of guilt, has ever been regarded as so dan-

[* Although the whole of this case was not read by Mr. Dallas; yet, as great part of it is not only interesting but applicable, the reporter thought proper to give it entire.]

gerous a practice, that the law requires all the proceedings in such a mode of putting to death, to be "exceedingly nice and circumstantial" as *Blackstone* says; and "any single minute point omitted, or misconducted, renders the whole outlawry illegal, and it may be reversed; upon which reversal the party accused is admitted to plead to, and defend himself against the indictment." 4 *Blackstone* 315.

This liberality of spirit seems to have advanced with the improvement of the human mind, and of those laws, from which our own are composed: For, by the statute of 4 & 5 *W.* & *M.* *c.* 22. wisely and benevolently reciting, that, "it is agreeable to justice, that proceedings in out-lawries in criminal cases, should be as public and notorious, as in civil causes, because the consequences to persons out-lawed in criminal cases, are more fatal and dangerous to them, and their posterities, than in any other causes;" it was enacted, that, "upon issuing an *exigent* in a criminal case, there should issue a proclamation, according to the form of the statute made in the one and thirtieth year of Queen *Elizabeth*," &c. And the first mentioned statute was made perpetual by the 7 & 8 *W.* 3 *c.* 36.

It is our desire to regulate our conduct by the just maxims, and generous principles, that have been established, for keeping under proper directions, and restraining within proper limitations, this menacing part of jurisprudence.

We shall, therefore, be obliged, if you will be pleased to take the questions now proposed into your consideration, and to favor us with your answers.

First.—Whether the proceedings in this case are founded on common law, the act for the advancement of justice, or on any other, and what acts of assembly, or of parliament?

Second.—Whether there have been any, and what modern instances in *England*, prior to our declaration of independence, of persons being executed upon outlawry *by judicial proceedings alone?*

Third.—Whether there has ever been any, and what instance in *Pennsylvania*, of a person being executed upon outlawry *by judicial proceedings alone?*

Fourth.—Is such a mode of attainder compatible with the letter and spirit of the constitution of this state, which establishes, with such strong sanctions, the right of trial by jury?—See section the ninth of the declaration of rights——section the twenty-fifth of the frame of government, &c.

Fifth.—What authorities and precedents are considered as most applicable to the present case?

Sixth.—If this outlawry is principally founded on the act for the advancement of justice, do not these words, "attainted of the crime whereof he is so indicted or appealed as aforesaid, *and* from that time shall forfeit and lose all his lands and tenements, goods and chattles;" imply by force of the copulative, "and," that this forfeiture was the penalty designed to be incurred by such an outlawry, and may not the word "execution" in the following part of the clause, as it is connected with the word "trial," be reasonably applied to the other criminals there mentioned, so as to render it consistent with the preceding penal expressions? And is not this construction, in *favor of life*, strengthened by the improbability, that the legislature of *Pennsylvania* intended to make the law in this case more sanguinary here, than the law of *England* at that period, which, it is apprehended, required one or more writs of *capias*—an *exigent*—*five exactions*—at *five different county courts*—*a proclamation at the door* of a place for divine worship, &c. before an outlawry could be incurred, *Tremaine's P. C.* 281. &c. *Statutes* before mentioned—*Hale*—*Hawkins*—*Bacon*—*Blackstone.*

Seventh.—As the person was brought into the supreme court by *habeas corpus*, ought not judgment to have been *expressly* pronounced, as the reason assigned of judgment not being pronounced "afresh," in *Ratcliffe's* case, who was brought into the king's bench by *habeas corpus* is, "it having been pronounced before:" And in the case of *Stafford*, *Bartstead*, *Okey*, *and Corbet*, who were attainted by act of parliament, (cases nearly resembling this) "the chief justice pronounced the *usual* judgment as in cases of high treason." *Foster* 44.

Eighth.—If all the proceedings in the present case are as rigidly exact as the law requires, in this uncommon mode of taking away life, ought council to form a new kind of warrant for execution, thereby ordering, that on a certain day the offender be hanged by the neck 'till he be dead, or order in the warrant, that on a certain day execution be done upon the offender, leaving the sheriff to decide what is the punishment by law to be inflicted?

It would be agreeable to us, if you, gentlemen, would also be pleased to consider, whether the outlawry in the present case, may not be legally reversed, and the offender brought to a trial, for these defects in the proceedings.

First.—By the act for the advancement of justice it is directed, "that the *capias* shall be returnable before the *justices of that court*, where such party shall be indicted or appealed, at the supreme

or provincial court next after the taking of such indictment or appeal;" and that the party shall be called on by proclamation "to appear *before the said justices* at the said supreme court;" and it is set forth in the indictment in the present case, that it was taken at "*a court of oyer and terminer and general gaol delivery;*" but, the *capias* in the present case directs the party to be called on by proclamation, to "appear *before the justices of the supreme court.*" 'Tis true, the same persons are justices of both courts; but, the title of "*that court where the party shall be indicted,*" expressly required by the act, is omitted.

Second.—It is not returned by the sheriff, that the party was called on by proclamation, "to answer *to the commonwealth,*" as by the act aforesaid, and by the *capias* is directed.

Third.—It is not set forth that the *capias* was "delivered to the sheriff three months before the return thereof," as the same act requires: Nor does the sheriff even return, that he made the proclamations *by virtue of the said capias.*

The proclamations might be made without the writ; and though it may be inferred, that they were not, ought inferences against the accused to be admitted in a case so highly penal?

Fourth.—Is not the *form* of the proclamation prescribed by the act aforesaid, and ought it not to have been strictly pursued? and does not the first line of that form require the proclamation to begin with a setting forth of the *indictment?*

Fifth.—Ought it not to appear, *when*, and how, the party was "*for the cause aforesaid* BEFORE committed to the custody of the sheriff of the city and county of *Philadelphia,*" or at least, that it was *subsequent* to the proclamations in *Bucks* county?

Sixth.—The act before mentioned, and the *capias*, order the sheriff to "*make* proclamation *in* every court of quarter sessions," &c. but the sheriff returns that he "*caused* public proclamation to be made *at* two several courts of quarter sessions," &c. The word "*at*" is uncertain. So is the word "*public.*" Neither of them is usued in the act. The requiring "*the sheriff to make* the proclamations," appears to have been intended to oblige his attendance in person at so solemn a transaction, leading to such fatal consequences. It is not returned, that he was *present.* As to the other words, proclamations might be in some sense said to be "public," and "at the courts," and yet not "in the courts." Where life depends on proclamations, it seems scarcely possible to adhere with too scrupulous an exactness to injunctions positively directed by law, for giving them their destructive efficacy.

Seventh.—It does not appear by the return *who* was called on by proclamation to appear.

The offender has represented to us by petition, that, at the time, when the outlawry was sued forth against him, he was in *New-York*, then in the possession of the British army. What regard ought to be had to that circumstance, you, gentlemen, can determine.

I am, with respect,

Gentlemen,

Your most obedient and very humble servant,

JOHN DICKINSON.

To these inquiries the following answers were returned, addressed to his excellency the president in council, on the 15th of *January* 1785.

Sir,

We had the honor of receiving on the 29th of *November* last, the letter from your excellency, and the honorable the supreme executive council, dated the 22d of the same month, respecting the case of *Aaron Doan*, who stands attainted of a robbery in the county of *Bucks*, by *outlawry*, and against whom execution has been awarded. In this letter the council express difficulties with regard to their issuing the warrant for his execution, and have desired the opinion of the judges on nine several questions. Before we gave our answers to these questions, it was expected that all the judges might consult together, in court upon them; but, as we now despair of this for some months, we shall offer what we think may be material on the occasion without further delay.

Previously to the giving our answers, we beg leave to observe, that the judges do not hold themselves bound to assign any reasons for their judgments; and when they do give reasons, it is always *in public*. This is mentioned, that the present proceeding may not be drawn into a precedent.

We would next observe generally, that on outlawry for felony, is a *conviction and attainder* of the offence charged in the indictment, and has been as long in use as the law itself. The intention of it was to compel all men to submit to the laws of their country, and to prevent their escaping justice, by flying, and staying away, until all the witnesses are dead. It is a very important part of the criminal law; and we do not find an occasion, where any question of law, upon a writ of error to reverse an outlawry in a *criminal* case, ever underwent a *serious* litigation, before that of *John Wilkes*, Esq. in 1770.

If there be any thing improper in taking away the life of a man upon an attainder by a judicial outlawry, it belongs to the legislature to alter the law in this particular; the judges cannot do it. But council can interpose their mercy.

In our answers, we shall refer to the questions, in the order they are placed in your excellency's letter, without inserting them here.

ANSWER'S TO THE QUESTIONS.

First.—The proceedings in this case are founded on the act of assembly, entitled, "An act for the advancement of justice, and more certain administration thereof."

Second.—Our law books do not inform us, except very rarely, of the executions of capital offenders; they are generally to be found in the histories of the times, or in the periodical publications; and, therefore, we cannot mention with certainty any modern instances in *England*, prior to our declaration of independence, of persons being executed upon outlawry *by judicial proceedings alone;* but lord chief justice *Manefield*, in *Wilkes's* case, expresses himself thus: "*Flight*, in *criminal* cases, is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattles. Outlawry, in a *capital* case, is as a *conviction* for the crime: And *many men, who never were tried, have been executed upon the outlawry.*" 4 *Burrow.* 2549.

Third.—We do not know of any instance in *Pennsylvania*, of a person being executed upon outlawry *by judicial proceedings alone:* But a certain *David Dawson* was executed since the declaration of independence, in consequence of an attainder by virtue of a proclamation of the supreme executive council, *and judicial proceedings thereupon.* In that case, the court awarded execution, by pronouncing the usual *sentence* of death; no judgment having been given *before.*

Fourth.—We conceive, such a mode of attainder compatible with the letter and spirit of the constitution of this state, and that it is no infringement of the *right* of trial by jury; for, that the party had not that trial, was owing to himself; he was not deprived of the right. As well, indeed, might an offender, who confessed the fact in court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty. 2 *Hawkins, fo.* 170. *chap.* 23. *sec.* 53. 2 *Hale* 208.

Fifth.—We conceive, all the authorities and precedents of outlawries in *capital* cases at common law in *England*, as applicable

to the present case; there being no difference, but in the form and manner of proceeding to the outlawry, which is made by the before-mentioned act of assembly.

In particular we would refer council to 4 *Burr.* 2527 and to 2577, where almost all the authorities are collected together and fully considered.

Sixth.—In the act for the advancement of justice, &c. *sec.* 17, the legislature have declared, "that the party indicted of a capital offence, not yielding his body to the sheriff at the return of the *capias*, shall be, by the justices of the supreme court, pronounced *outlawed*, and *attainted* of the crime whereof he is so indicted. And from that time shall forfeit all his lands and tenements, goods and chattles: *which forfeiture*, &c. after debts paid, shall go, one half to the governor for the time being, &c. and for defraying the charges of prosecution, trial and *execution* of such criminals." Had the clause ceased at the end of the words "attainted of the crime whereof he is so indicted," no doubt remains with us, but that the party was liable to suffer all the pains of death prescribed by law for the offence specified in the indictment; and the words following, so far from altering this construction, in our opinion, shew, by the most necessary, evident, and strong implication, that the party was liable also to be *executed*; for the expences of the *execution* are to be defrayed out of his forfeited estate.—We therefore have no doubt, that *Aaron Doan*, besides the forfeiture of his estate, has forfeited his life.

Seventh.—We conceive, that, where a person is attainted by an act of parliament or assembly, and is brought before the court, and execution awarded, the practice *most generally* has been to do so, by pronouncing the *express* sentence; and the reason given for it, is, because no *judicial* sentence had been pronounced *before*; but in case of an outlawry by *judicial proceedings only*, no *express* sentence is given upon the party's being brought before the court, but merely an award on the roll, *that the sheriff do execution at his peril*, or *execution awarded by the court*; because a judgment had been given *before*. Judgments in criminal cases are divided into two kinds.—1. By *express* sentence to the punishment proper for the crime.—2. Judgments without *any such sentence*. Of the *latter* there are two kinds. 1. Outlawry. 2. Abjuration. Judgment of outlawry in *England* is given by the *coroner*, and is in these words, "Therefore the said A. B. by the judgment of the coroner of our lord the king of the county aforesaid is outlawed." The party is thereby as much attainted, and shall forfeit and lose as much, as if sentence had been given against him upon a verdict or confession. *Finch of Law*, 467. 3 *Inst.* 52. 212. *Cro. Coro.* 266. &c. And after such outlawry, if the party is brought before the court of *king's bench*,

"execution shall be awarded against him, *but no sentence pronounced*, because the outlawry is a *judgment*, and no man shall have two judgments for one offence." 2 *Hawk. chap.* 48. *sec.* 23. *fo.* 447, and the cases there cited. But in the present case, the judgment was pronounced before *by this same supreme court*, that *Aaron Doan* is *outlawed and attainted of the crime whereof he is indicted*, and we do not think, that it would have been formal to have given a second express judgment. This matter was mentioned, and well considered by the judges, at the time they awarded execution in the present case of *Aaron Doan*.

Eighth.—The judgment against *Aaron Doan*, is, *that he is outlawed and attainted of the crime whereof he is indicted*—The record shews that he was indicted of a robbery; in which case, the express judgment is, "that he shall be taken back to the place from whence he came, and from thence to the place of execution, and there be hanged by the neck until he is dead." The judgment of outlawry implies all this. We therefore think, that a warrant for the execution may properly issue, giving these special directions to the sheriff. We find, that executions have been commanded to be done by the court *without writ*, sometimes by *writ*; and that the king in *England* has, by special warrants, frequently remitted part of the punishment and directed the rest, and changed hanging for beheading, though some have doubted of his authority to do so, in the latter instance. 2 *Hawk. chap.* 51. *sec.* 4. 5. *fo.* 463. *Finch of Law*, 478. 3 *Mod.* 42. *Cro. Jac.* 496.

Ninth.—We do not think, that the *outlawry*, in the present case can, at this stage of the business, be legally reversed. The several critical and verbal objections, now stated by council, as well as most of those preceding were made at the bar, in behalf of the prisoner, by his counsel learned in the law, answered by the prosecutor for the commonwealth, and over-ruled by the court, upon full discussion and mature consideration. The court cannot *make* errors, nor reverse for errors which do *not exist*, or which they *cannot see*: They must be satisfied, that there *are errors*. There may, perhaps, be some small mistakes in the *transcript* of the record by the prothonotary, as we have not seen it, but there is no error in the record itself, that we have been able to discover. There has never been a question seriously litigated in *Westminster-Hall* upon a writ of error to reverse an *outlawry* in a *capital* case. Such a writ was never granted, but from justice, where there really was error, or from favor, where the king was *willing* the *outlawry* should be reversed: They are grantable merely *ex gratia regis*, and when granted, there never was any opposition made, and the courts reversed them upon *slight and trivial* objections, which could not have prevailed, if opposed, or the precedent had been of any consequence; which could not be, as the king had the power to *refuse* the writ. All

was by consent of the king, and the reversal took place, though there was really *no error at all.*

It is as much a breach of duty, to reverse a good, as it would be to affirm a bad outlawry. The mischief goes farther than an unrighteous sentence in the particular case; for, to reverse without an error, is to abolish that part of the law.

Your excellency further informs us, that the offender has alledged in his petition to council, that he was in the city of *New-York* at the time the outlawry was sued forth against him. In answer to this, we can only say with certainty, that if he had put any material fact in issue, it would have been tried.

Upon the whole, three indictments for robbery have been found against him in *Bucks* county; by the examinations of *Jesse Vickers*, *Solomon Vickers*, *John Tomlinson*, *Israel Doan*, *Joseph Doan*, &c. he was a principal in them, and eight or nine others in that county, and the counties of *Philadelphia*, *Chester* and *Lancaster*; he has been duly outlawed for one of them, and execution legally awarded, according to our judgments.

We have the honor to be,
With the greatest respect,
Sir,
Your Excellency's and the Council's
Most obedient humble servants,

THOMAS M'KEAN,
GEORGE BRYAN,
JACOB RUSH.

[U. 4.]

Minutes of Assembly of 1800–1, *page* 228.

By whatever process, then, punishment for an offence can be inflicted, it must be denominated a criminal prosecution; and it is obvious, that a contrary doctrine, would make mere matter of form, the fluctuating criterion of our dearest rights.

Thus, an impeachment by the legislature, is a criminal prosecution, though a conviction can only affect the delinquent's office; and the characteristic distinction between the impeachment, and the address, is, simply that the same effect (a removal from office) may be produced in the latter course of proceeding, for any reasonable cause to which the former course of proceeding could not be extended. But the very terms of the constitution must extinguish every doubt on the subject, for there we find, criminal

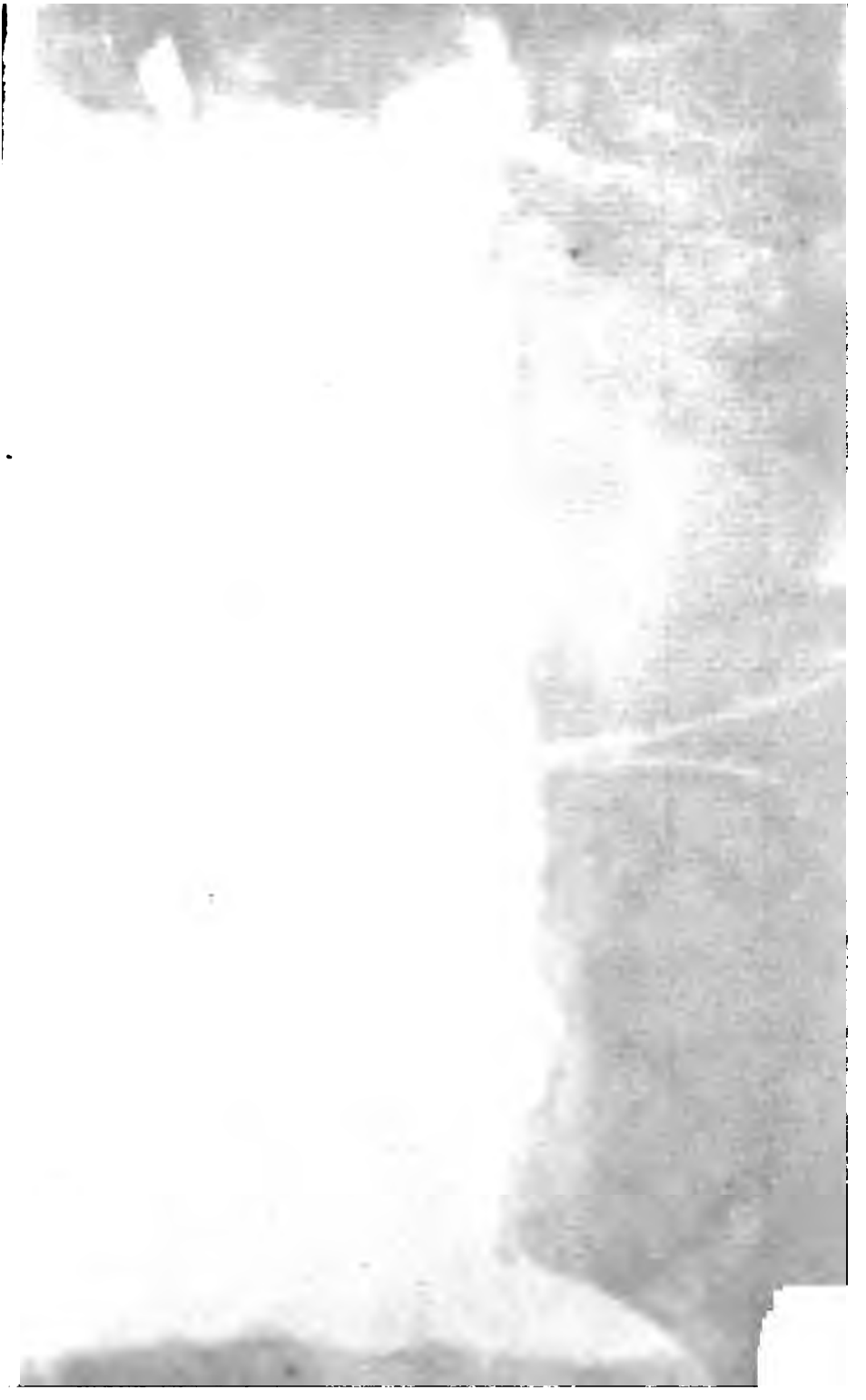
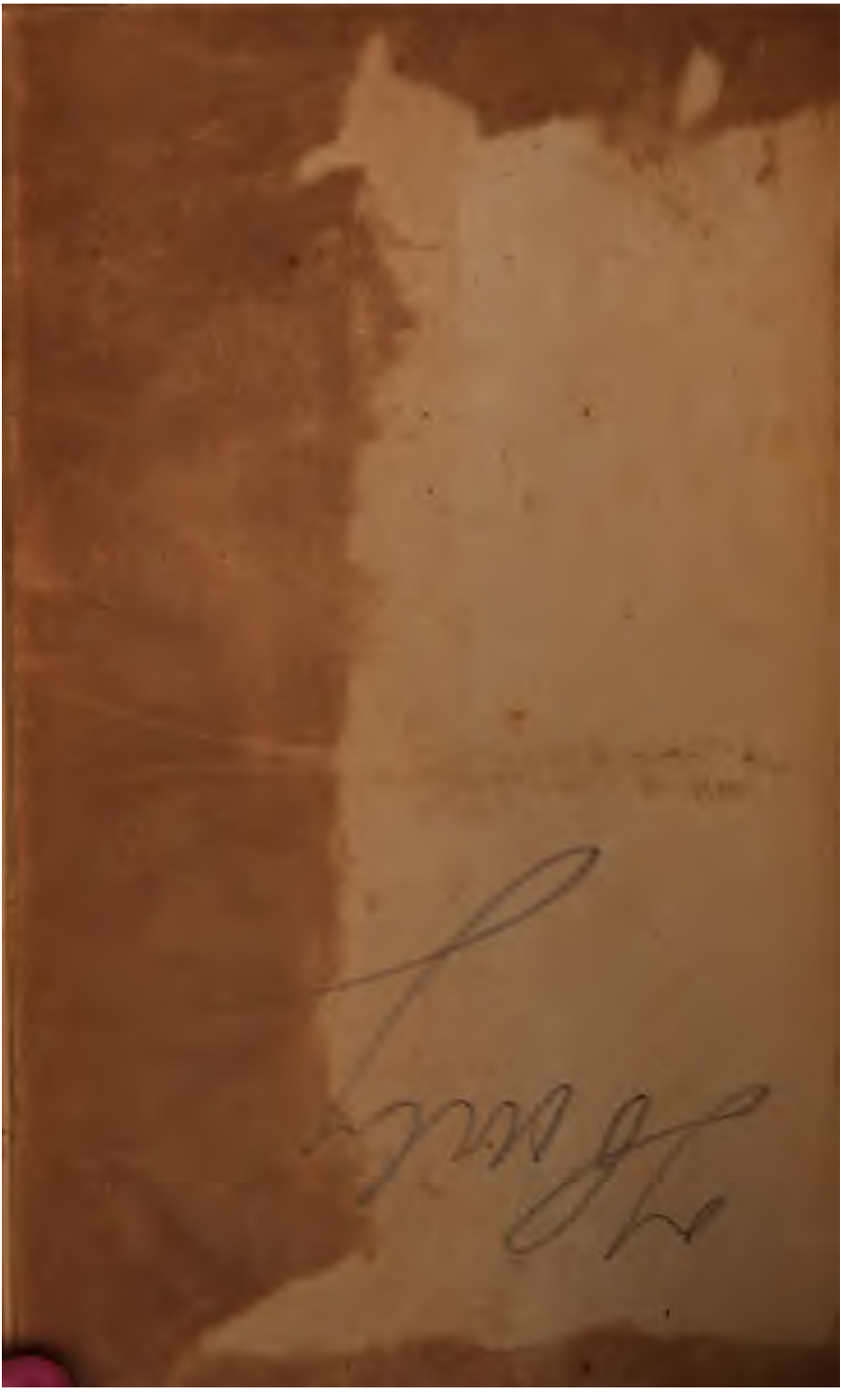
prosecutions, *by indictment or information*, expressly distinguished from other criminal prosecutions; and *in addition* to the privileges allowed in "*all* criminal prosecutions," the defendant *on an indictment, or information*, has a right to "a speedy public trial, *by* an impartial jury of the vicinage."

[V. 4.]

Constitution of 1776. *Bill of Rights.*

Section 9. That in all prosecutions for criminal offences a man hath a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial by an impartial jury of the country, without unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land or the judgment of his peers.

[W. 4.]

Constitution of 1790.

Section 9. That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, *in prosecutions by indictment or information*, a speedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.